EDITOR'S NOTE

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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VICTOR H. VAN SANT,

Petitioner

v.

UNITED STATES POSTAL SERVICE,
U.S. ARMY CORPS OF ENGINEERS, AND
MERIT SYSTEMS PROTECTION BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Questions Presented

The District Court determined that petition was invalidly released from federal service in 1971 in violation of transfer rights under the Veterans' Preference Act, then determined sua sponte that petitioner might have been "validly" released later in that year, without transfer or reemployment, and with no agency notice being issued. The Court of Appeals affirmed summarily.

Question No. 1

Can a federal court issue a retroactive, substitute agency personnel action without directly violating decisions of this Court defining the proper role of a federal court in reviewing and redressing invalid agency personnel actions (SEC. v. Chenery Corp., 332 U.S. 194 (1947); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959)), and without effectively nullifying Acts of Congress, including the Back Pay Act of 1966?

Question No. 2

Is it consistent with stare decisis and due process for a Court of Appeals to issue a not-for-publication decision summarily affirming a retroactive judicial-substitute agency personnel action without offering any basis of reconciliation with authoritative decisions, including by this Court, directly in conflict?

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OPINIONS BELOW

The unpublished opinion of the U.S. Court of Appeals For the Fourth Circuit filed August 29, 1985 (No. 84-2387, No. 85-1107, consolidated), is reproduced in the Appendix, pages A1 through A5. In regard to the questions in this petition, the Fourth Circuit's opinion adopted an unpublished Memorandum Opinion of the U.S. District Court, Ea. Dist. of Va., Alexandria Division filed October 24, 1984 (No. 84-0417A), reproduced in the Appendix, pages A6 through A26. The District Court reversed in part an unpublished Decision of the Merit Systems Protection Board (No. DCO 3518020006 REM), filed January 10, 1984, Appendix pages A27 through A58. All prior agency and court opinions in this case twice remanded by the Fourth Circuit (unpublished, not immediately relevant) are found in Appendix pages A59 through A129.

BASIS FOR JURISDICTION

The Fourth Circuit's Judgment and Opinion were filed in this case on August 29, 1985. On September 27, 1985, the Fourth Circuit entered an Order denying petitioner's motion for reconsideration. This Court has jurisdiction to review a decision of a United States Court of Appeals filed within 90 days under 28 U.S.C.§1254(1), §2101(c), Court Rule 20.

CONSTITUTIONAL PROVISION, STATUTES, REGULATIONS, and RULES INVOLVED

The Fifth Amendment to the Constitution in relevant part provides: "No person shall be ... deprived of ... property, without due process of law ..."

The statutes involved in this case relate to federal agency authority, the Civil Service, Veterans' Preference, and the Back Pay Act of 1966. The relevant portions are set out in the Appendix at pages B1 through B6.

The regulations involved in this case relate to Civil Service rules for reductions-in-force, transfer of functions, the rights of preference eligibles, and employee entitlement to back pay and other benefits. Relevant portions are set out in the Appendix at pages B6 through B19.

Also relevant are Fourth Circuit Internal Operating Procedures 36.3 through 36.5, set out in the Appendix at pages B19 through B20.

STATEMENT OF THE CASE

After 12 years of proceedings, that included two Court of Appeals reversals of lower decisions adverse to petitioner not supported by substantial evidence, the two federal agencies involved in this matter participated in a 1983 MSPB hearing that finally produced an adequate factual record.

The Fourth Circuit Court of Appeals

has now affirmed (App. A4) a 1984 District Court determination that Van Sant's job function was transferred de facto from his agency, the U.S. Postal Service, to the U.S. Army Corps of Engineers when Corps employees during nearly half of 1971 took over and performed Van Sant's work (App. A8-A16). In consequence, the Court of Appeals also affirmed (App. A4-5) a District Court determination (App. A16, A25) that Van Sant was improperly released from federal service through a "Reduction-in-Force" Notice given to him on August 27, 1971, in disregard of his transfer rights as a veteran under 5 U.S.C. §3503, Veteran's Preference Act (App. B2).

Instead of ordering reinstatement to federal service and associated relief under the Back Pay Act of 1966, however, the District Court proceeded to determine on its own initiative that, because the

Corps details ended, and Van Sant's duties after his release were reassigned within the Postal Service, Van Sant might have been given a "valid" release "notice" by the Postal Service some two months after his actual separation (App. A16-17, A21-24). No such notice was ever issued, and Van Sant was never transferred or restored to duty. Nevertheless, the District Court ordered Van Sant's back pay recovery limited to a hypothetical period of time he would have served had he received a reduction-in-force notice from the Postal Service on December 7, 1971 (App. A17, A24-26).

This determination and the District Court's retroactive judicial-substitute agency release notice has been affirmed by the Fourth Circuit by summary disposition, with no authority being cited by either court, nor any legal discussion of the basis for the relief.

This case raises fundamental questions of public policy and judicial integrity. A retroactive judicial-substitute agency personnel action, petitioner believes, is in direct conflict with decisions of this Court defining the proper role assigned to federal courts by Congress when reviewing federal agency determinations. Direct conflict also exists between the decision below and decisions of this Court prescribing relief for invalidly separated federal employees, and with a related Act of Congress providing redress for unjustified federal personnel actions intended to promote a career federal service. Further, the decision below would effectively nullify an Act of Congress providing employment security for veterans. And it raises dramatically the most basic due process question whether a federal court can contradict decisions of this Court, and

nullify Acts of Congress, through an arbitrary, unexplained, summary disposition.

The essential facts and history of the case are these: Without Management approval, operating officials arranged for certain architects transferred to the Corps of Engineers on June 27, 1971, to be "detailed" back to the Post Office Department just before its reorganization into the Postal Service. These irregular detailees took over Van Sant's duties, and were performing them on August 27, 1971, when Van Sant received a Reduction-in-Force ("RIF") Notice stating he had been "reached" for release under Civil Service RIF regulations since "no position" in the reorganized Postal Service could be offered him. Van Sant's Notice and Retention List gave no explanation or mention of the Corps employees, a procedural failure that prejudiced Van Sant's appeal

rights, and took the next 12 years to overcome.[1] When Van Sant was released on October 12, 1971, Corps detailees were still performing his work.

Van Sant appealed his release to the Civil Service Commmission (App. B15), including his non-transfer to the Corps of Engineers, but the Postal Service resisted Van Sant's claim and a hearing by "certifying" to the Commission that "no transfer" of Van Sant's job function to the Corps had occurred (App. A102, A124), and asserting his position and work had been discontinued (App. A102-103). When Van Sant informed the Commission in January 1972 that he had heard his duties had recently been reassigned to Postal

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[1] Civil Service Commission regulations on Reductions-in-force at the time required a separate listing of "each employee serving in ... the competitive level under specifically limited temporary appointment," 5 C.F.R. §351.404(c) (App. B9), and required the Notice to contain "the reasons for retaining a lower-standing employee in the same competitive level," 5 C.F.R. §351.802 (App. B14).

Service personnel, giving rise to "reemployment" rights, see ft.6 infra, the Service advised the Commission, falsely, that no reassignment had occurred.[2]

The Commission did not order a hearing; it accepted Postal Service conclusory representations and denied Van Sant's appeal (App. A112-129). On review from a U.S. District Court (E.Dist.Va., Alexandria Division) civil action for relief against the Postal Service, Corps and other nominal parties (App. A108) (District Court jurisdiction over Postal

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[2] The MSPB found on January 10, 1984, that Van Sant's principal duties were assigned by operating officials in late 1971, as the Corps details ended, to Industrial Engineering Technicians (IET's), who were not architects (App. A52, A56, A21-22). Their Position Descriptions were not revised, however, and were used to persuade the Commission by letter that no Service personnel had been given any duties "covered by the position description of Mr. Van Sant" (Letter of Asst. Postmaster General Gayle of February 10, 1972).

Service under 39 U.S.C. §409), the Fourth Circuit in 1979 reversed and ordered a "complete evidentiary hearing" (App. A99).

At the MSPB's First Remand hearing, in 1980, the Service represented that Van Sant's work had been "contracted out" to a "private company" in the fall of 1971 (again denying reassignment to IET's, see footnote 2, supra), and refused to call witnesses requested by Van Sant (App. A73). In 1983, the Court of Appeals again reversed MSPB and District court decisions adverse to Van Sant (App. A83, A76) for errors of law and insubstantial evidence, and remanded once again for further evidentiary proceedings (App. A59). An adequate factual hearing was finally conducted by MSPB in November 1983.

Based on 1983 hearing findings, the District Court in October 1984 set aside the central conclusion of a January 1984 MSPB decision (App. A27) upholding

Van Sant's release, for failure of the presiding official to follow Court of Appeals instructions. The District Court concluded that the underlying facts showed a transfer of function "in reality" "because the same work -- Van Sant's work -- was still being done; it was simply being done by COE personnel" (App. A15). For this reason, the court determined that the August 27, 1971, Notice of release given to Van Sant was not valid (App. A16, A24). The Court of Appeals subsequently affirmed, in an August 29, 1985, per curiam decision (App. A3-4).

When an agency is found to have committed an "unjustified or unwarranted personnel action," the Back Pay Act of 1966, 5 U.S.C. §5596, provides certain relief (App. B3).[3]

[3] The Postal Service has contended it never abandoned responsibility for Van Sant's function, and conceded current per-

Without discussing the Back Pay Act, or relief under the Veterans' Preference Act, [illegible]itioning decisions by this and other federal courts on government personnel law, the District Court proceeded in October 1984 to make an additional determination regarding Van Sant's separation from federal service. Noting that the MSPB found that the last Corps detailee completed his detail on December 7, 1971, and stating the MSPB found that thereafter neither Van Sant's "position, nor his former task was continued" (App. A16)[4], the court declared: "it is only from the December 7, 1971 date that [Van Sant's] termination can be valid" (id.).

(Footnote 3 Con't) formance by Postal Service personnel using architects. Van Sant requested back pay and reinstatement to the Postal Service.

[4] This summarization of MSPB findings is not accurate in regard to Van Sant's "tasks" since they were found to have been mainly reassigned to Postal Service IET's, see ft. 2 supra. The District Court's

No notice of release on this date was issued by the Postal Service nor was Van Sant in the meantime transferred or restored to duty.

The District Court, however, apparently believed it had an obligation to determine if a later release date was possible. It thus held Van Sant was:

> ". . .entitled to the pay he would have received ... had a notice of termination been given him on December 7, 1971" (App. A16-17).

In a related portion of the Opinion following, the District Court also concluded that Van Sant could not "bump" "IET" position incumbents in 1971, relying on a Civil Service Commission conclusion in 1972 to that effect (App. A21-22; see App. A114), but failing to note that the CSC's determination was based on information by the Postal Service in 1972 that none of Van Sant's duties had been

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(Footnote No. 4 continued) Opinion itself recognizes this reassignment at App. A17, A21-22.

reassigned (revealed in 1983 to be false, see ft. 2 supra).[5]

No other reasons for a "valid" December 7, 1971, "release notice" were given by the District Court.

The Court of Appeals summarily affirmed the District Court's retroactive, substitute release notice in a per curiam decision issued August 29, 1985 (App. A1-5). In a not-for-publication opinion, the Court of Appeals stated the District Court had "correctly":

> " ... rejected Van Sant's argument that his job continued after [December 7, 1971], concluding that his various duties were validly dispersed, [and] awarded Van Sant the pay he would have received ... had he received a notice of termination on December 7, 1971" (App. A4-5).

The Court of Appeals upheld denial of reinstatement, back pay and other benefits "on the memorandum opinion of the district

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[5] No consideration was ever given by the Postal Service or by a reviewing authority

court," (id.). Subsequently, the Court denied, without explanation, a petition for rehearing (App. A131), and denied, without explanation, a motion for publication by Van Sant (App. A133).

REASONS FOR GRANTING THE WRIT

I. Issuance of a Restroactive Judicial Substitute Agency Personnel Action is in Direct Conflict with Decisions of this Court and Acts of Congress.

The Court of Appeals in this case has impermissibly affirmed a retroactive, judicial-substitute agency personnel action in direct conflict with decisions of this Court (1) limiting the domain of a federal court to a reviewing role when passing on actions committed by Congress to agency discretion, SEC v. Chenery Corp, 332 U.S. 194 (1947); and (2) establishing appropriate redress, including reinstate-

(Footnote No. 5 continued) or even claimed by the Postal Service, to Van Sant's qualifications for the sharply revised "IET" position.

ment, for federal employees separated in violation of law or binding regulations, Service v. Dulles, 354 U.S. 363 (1957), Vitarelli v. Seaton, 359 U.S. 535 (1959). Further, the judgment below has effectively nullified without basis, Acts of Congress providing employment protection for veterans (notably the Veterans' Preference Act, 5 U.S.C. §3503, App. B1-2), and relief for wrongfully separated federal employees, adopted to promote equity and a career federal service (the Back Pay Act of 1966, 5 U.S.C. §5596, App. B3).

A Writ should be granted to preserve the integrity of this Court's decisions and prevent violence to the public policy expressed in Acts of Congress. If the decision below is not corrected, a reversal of long-established principles of federal personnel law will occur that will sow needless confusion over the right of federal employees, the issues in personnel

disputes, and the role of federal courts in reviewing personnel actions.

1. Direct conflict with SEC v. Chenery Corp. In SEC v. Chenery Corp., 332 U.S. 194 (1947) this Court summarized what it called "a simple but fundamental rule of administrative law":

> "That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely on the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency," emp. sup., p. 196.

An agency personnel action separating an employee is clearly a "domain which Congress has set aside exclusively" for "determination or judgment" by the agency alone. Thus, Congress has expressly given to the "Postal Service" the "right ... to

hire, transfer ... and retain ... employees in positions within the Postal Service," 39 USC 1001(e)(2)(App. B5), an authority conferred generally on federal agencies, see, e.g., 5 U.S.C. 7106(a) (App. B4). And Congress has directed that the Postal Service "career service ... shall be a part of the civil service," 39 USC 1001(b)(App. B5), governed since 1883 by rules prescribed by the Civil Service Commission/Office of Personnel Management. Congress, moreover, has specifically instructed the Civil Service Commission/OPM to "prescribe regulations for the release of competing employees in a reduction in force," 5 USC §3502(a) (App. B1). These regulations provide that "each agency" conducting a RIF shall make detailed judgments and determinations, and follow carefully prescribed procedures "when it releases a competing employee," 5 C.F.R. §351.201(a)(App. B7).

In a 1982 decision holding that an agency reduction-in-force was subject to the rule in SEC v. Chenery Corp., and setting aside an attempted MSPB substitute action, the D.C. Circuit summarized required agency determinations, as follows:

> "Pursuant to the [RIF] plan, an administrative area must be designated from which a certain number of employees will be released and within which the employees must compete to be retained. Retention is determined according to a variety of factors including veteran's preference and seniority. The 'competition' is conducted through a 'retention register' on which employees are listed according to their 'competitive level' ... seniority, and so forth. Once the individuals who are to be released are identified, 'reassignment' rights come into play. These rights permit certain individuals under certain circumstances to 'bump' (displace) others or to 'retreat' to previous jobs. The intricacies of the procedure are remarkable ..." Horne v. MSPB, D.C. Cir. 1982, 684 F.2d 155, 156 ft2 (1982).

Since the agency carried out what was found to be a de facto RIF, without extending "procedural and substantive pro-

tections guaranteed by RIF regulations" (p. 157), the D.C. Circuit held that the MSPB could not uphold agency action based on its contention "that a proper RIF could have achieved the same result" (id., emp. by the court). The agency alone had discretion to define the "competitive area." The D.C. Circuit said:

> "Simply put, the Board should not be in the business of affirming administrative decisions based upon how an agency might have acted if it had followed proper procedures," p. 157-158.

Yet this is exactly what the courts below have attempted in this case, without authority from Congress to release federal employees, undertake personnel actions, or short-circuit the step-by-step determinations an agency must follow to observe the rules for maintaining a federal career service.6

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6 Not only was a "release" of Van Sant at the hypothetical time in the District

In Bell v. U.S., 366 U.S. 393 (1961) the issue before this Court was whether American prisoners captured during the Korean War who cooperated with their captors, abused fellow prisoners, and refused repatriation to the United States when the war was over were entitled to back pay

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(footnote continued)

Court's order determinable only by his agency, but the District Court should have realized that a two-year period of "reemployment" (not "bumping") rights arose after Van Sant's October 1971 release from the Postal Service (see 5 USC §3315, App. B1; regulations at App. B6), and that neither was determinable in view of Postal Service failure to revise position descriptions to show reassignment of Van Sant's duties, see ft. 2 supra. Such revision was required, see: 5 C.F.R. §351.701(a)(App. B13) (assignment rights depend on "duties and responsibilities of the position"); Federal Personnel Manual Chap. 295, Subch. 3, position descriptions must be certified to be "complete and accurate" (App. B19); Rasmussen v. U.S., 543 F.2d 134, 211 Ct.Cl. 260 (1976) (central factual issue in assignment rights is employee's ability to perform actual duties of position within 90 days). Thus the court's determination of a December 7, 1971 "release notice" date was baseless, as well as beyond its power.

while prisoners. The Government argued that their misconduct as prisoners constituted being "absent from their posts of duty" and that a retroactive, judicial determination on the merits to this effect should be made. The Court directed payment of back pay, declaring: "The Army cannot rely upon ... an administrative determination that was never made," p. 413. The decision below relies on administrative determinations never made in clear violation of Chenery Corp. and Bell.

2. Direct conflict with Service v. Dulles and Vitarelli v. Seaton. Beginning in 1957, a rule of law has emerged in government personnel cases, closely related to SEC v. Chenery Corp., that the separation of a federal employee in violation of law or binding regulations makes the agency's action a nullity that leaves the employee legally as if on the rolls of the agency. After reinstatement, the

agency may initiate a valid action. There is no role for federal courts under this rule, based on public policy, to attempt to "salvage" improper agency action.

In the landmark case of Service v. Dulles, 354 U.S. 363 (1957) this Court held that an employee's separation could not stand where duly issued procedural regulations of the agency were not followed. Such regulatons have the "force and effect of law," this Court had said in Accardi v. Shaughnessy, 347 U.S. 260, 265 (1953) (relied on in Service, p. 372), and are "binding upon [the government administrator] as well as the citizen," id. In basing its decision strictly on the public policy principle that duly issued agency regulations are as definitive of the rights of the parties as statutes, the Court noted it was "not ... concerned in any wise with the merits of

the Secretary's action in terminating the petitioner's employment" (p. 373).

In Vitarelli v. Seaton, 359 U.S. 535 (1959), this Court expanded Service v. Dulles reasoning to an untenured federal employee, who held an appointment making him subject to discharge with no explanation being required. While the case was pending in District Court, the agency, without reinstating the employee, issued a "revised" "notification of personnel action" that dropped all reference to the original security reasons and separated petitioner for no reason. This Court held that since the "proceeding attendant" on the original dismissal "fell substantially short of the requirements ... of applicable department [hearing] regulations ... such dismissal was illegal and of no effect" (p. 545), emp. sup. Further, the Court held that the "revised notification" was not entitled to enforcement, retroac-

tively or prospectively.[7] The Court ordered relief, as follows:

> "[P]etitioner is entitled to the reinstatement which he seeks, subject, of course, to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment" (p. 546).

The Fourth Circuit's failure to follow Service and Vitarelli in the decision below is manifest.

3. Nullification of the Back Pay Act of 1966. In 1966 Congress enacted a

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[7] Four justices dissented as to prospective application. The dissent (written by Frankfurter, J.) agreed with the basic public policy principles of the decision, however, in these words: "An executive agency must be rigorously held to the standards by which it professes its action is to be judged. See SEC v. Chenery Corp. ... Accordingly, if dismissal ... is based on a defined procedure ... that procedure must be scrupulously observed. See Service v. Dulles ... This judicially evolved rule of administrative law is now firmly established and rightly so. He that takes the procedural sword shall perish with that sword", p. 546-47. (And see Morton v. Ruiz, 415 U.S. 199, 235 (1974): "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.")

comprehensive statute providing relief for federal employees suffering certain wrongful personnel actions, the Back Pay Act of 1966, 5 U.S.C. §5596, 80 Stat. 94 (App. B3). This Court has held that the 1966 Act is "a broad remedy for cases of improper ... dismissal," which makes injunctive relief in federal government-employee disputes generally not available, Sampson v. Murray, 415 U.S. 61, 82 (1974).

The Act provides pertinently that:

> "(b) An employee of an agency ... found ... under applicable law or regulation to have undergone an unjustified or unwarranted personnel action ... (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to ... the pay ... the employee normally would have earned during that period if the personnel action had not occurred, less ... other employment [earnings]; and (2) for all purposes, is deemed to have performed service for the agency during that period ...", emp. sup.

Clearly, the relief to which Van Sant is entitled is governed, in the first

instance, by the 1966 Act and substantially identical agency regulations,[8] yet the decisions below fail to mention either.

The legislative history of the Act reveals an intention to enact SEC v. Chenery, Service v. Dulles, Vitarelli v. Seaton, Bell v. U.S., supra, and related Court of Claims cases (presented in para. 4, infra) into a general statutory rule with wide impact. Senator Mansfield, explaining the bill to the Senate, stated its "purposes" were to "consolidate and liberalize existing law on the restoration of an employee to his position," to "give to all employees, veteran and non-veteran

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8 See App. B18. No basis for a difference in interpretation exists. Administrative regulations must be given their "commonly understood meaning," Whelan v. U.S., 529 F.2d 1000, 1002 ft2, 208 Ct.Cl. 688 (1976).

... the benefits of the present law at its best," Congressional Record Vol. 112, Part 5, page 5593, March 16, 1966. His remarks quoted Senate Report 1062, text at 1966 U.S. Code Cong. & Admin News p. 2097-2101.

Congressman Beckworth, explaining the provisions of the bill to the House, remarked the bill was an official request of the Civil Service Commission, was required by "equity," and would:

> "[E]xtend to all Federal employees ... the existing provisions of law that provide for restoring pay and other benefits to an employee which he may have lost because of an unjustified or unwarranted personnel action ... It takes the best elements of existing laws on the subject and consolidates them into one logical, equitable, and comprehensive authority ..." Congressional Record, Vol. 111, Part 2, page 475-76, February 10, 1965. Consult House Report 32, Post Office & Civil Service Cte, February 9, 1965.

The Back Pay Act of 1966 does not authorize departures from the principles

of SEC v. Chenery and Vitarelli v. Seaton. Where an employee has been improperly separated, the agency's action will normally continue "in effect", with benefits under the Act accruing, until the employee is restored to duty by his agency or a reviewing authority.

Summarizing the 1966 Act this Court said in Sampson v. Murray, supra: "Congress has provided that a wrongfully dismissed employee shall receive full pay and benefits for any time during which the employee was wrongfully discharged from employment," p. 75, emp. sup.

If substitute personnel actions could be issued by a reviewing authority and given retroactive effect, adoption of the Back Pay Act of 1966 would make no sense. Its remedial and equitable purpose as perfecting legislation would be nullified. The very basis for this

Court's holding in Sampson v. Murray, supra, that the Act renders injunctive relief generally unavailable in government-employee disputes, would be destroyed.

4. Conflict with Court of Claims and Court of Appeals decisions. In a large progeny of decisions following and interpreting Service v. Dulles, Vitarelli v. Seaton, or the Back Pay Act of 1966, the Court of Claims and five U.S. Circuit Courts have applied consistent principles of law denying any scope to a judicial substitute action, as follows:

a. An agency personnel action separating an employee or otherwise denying salary benefits in a substantial violation of statutory law or binding regulations is void; the employee in consequence is to be treated legally as if still on the rolls of the agency; he is

entitled to back pay, service credit, and reinstatement. See: Ritter v. Strauss, D.C. Cir. 1958, 261 F.2d 767 (reinstatement; RIF violation of veteran's rights); Smith v. U.S., 151 Ct.Cl. 205 (1960) (6 years back pay awarded to date-of-judgment[9]); Camero v. U.S., 375 F.2d 777, 179 Ct.Cl. 520 (1967) (8 years back pay to date-of-judgment); Garrott v. U.S., 340 F.2d 615, 622, 169 Ct.Cl. 186 (1965) ("the established rule for personnel and pay cases"); Hanifan v. U.S., 354 F.2d 358, 364, 173 Ct.Cl. 1053 (1965) (rule "firmly established"); Jones v. U.S., 203 Ct.Cl.

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[9] Until 1972 the Court of Claims could not order reinstatement. Congress amended 28 U.S.C. §1491 in that year "to provide an entire remedy and complete the relief", see 1972 U.S. Code Cong. & Admin News p. 3117. However, an award of back pay to date-of-judgment usually compelled reinstatement since a further action in the Court of Claims would otherwise lie, Ainsworth v. U.S., 399 F.2d 176, 181, 185 Ct.Cl. 110 (1968).

544, 550 (1974) (procedurally irregular determination of "competitive level" made reduction-in-force "void ab initio"); Ryder v. U.S., 585 F.2d 482, 487, 218 Ct.Cl. 289 (1978) (voidness called position "the court has regularly taken"); Crimaldi v. U.S., 2nd Cir. 1981, 651 F.2d 151, 153 (rule "well-established"); Alaniz v. OPM, Fed. Cir. 1984, 728 F.2d 1460, 1470 (procedurally improper changes in Cost of Living differentials held "void," citing, inter alia, Morton v. Ruiz, supra, 415 U.S. p. 235, in turn citing Service and Vitarelli). Accord: Middleton v. U.S., 170 Ct.Cl. 36, 40 (1965); Whelan v. U.S., supra, 529 F.2d p. 1003; Cruz-Casado v. U.S., 553 F.2d 672, 675, 213 Ct.Cl. 498 (1977); Shaposka v. U.S., 563 F.2d 1013, 1018, 215 Ct.Cl. 34 (1977).

b. Under Service and Vitarelli, for a void personnel action, the employee

is entitled to back pay and reinstatement even without statutory authority. See: Watson v. U.S., 162 F.Supp. 755, 142 Ct.Cl. 749 (1958) (remand directed by this Court at 355 U.S. 14 "for reconsideration in light of Service v. Dulles"). Accord: Newman v. U.S., 143 Ct.Cl. 784 (1958); Daub v. U.S., 292 F.2d 895, 898, 154 Ct.Cl. 434 (1961); Ciambelli v. U.S., 203 Ct.Cl. 680, 686 (1974).

c. The Back Pay Act of 1966 covers "unjustified or unwarranted" separations and demotions with no distinction in relief or rules as between removals for cause, RIF separations, statutory or procedural separations. See Ainsworth v. U.S., Ct.Cl. 1968, supra, 399 F.2d p. 180-181; Rasmussen v. U.S., Ct. Cl. 1976, supra, 543 F.2d p. 142 (citing removal and RIF decisions indiscriminately); cases cited in subpara. a. supra (same).

No distinction exists in Act regulations, see 5 C.F.R. §550.803, App. B16-17.

d. The goal of the Back Pay Act of 1966 was to make the injured employee "whole" financially as if the agency's improper action had not taken place; hence the back pay award should extend to when the employee is actually restored to duty. See: Floyd v. Resor, 5th Cir. 1969, 409 F.2d 714, 716 (called the "plain meaning" of the Act); Olsen v. Arrington, 10th Cir. 1980, 621 F.2d 363, 365 (dicta: "[T]he goal of the Back Pay Act" is to "place" an employee "in the position he would have been in had the wrongful separation not occurred"); Ciambeli v. U.S., Ct.Cl. 1974, supra, 203 Ct.Cl. p. 687 (Act requires agency "to make the employee whole as if he had never been excluded").

e. The "merits" behind a void agency personnel action separating an

employee are not relevant; only after restoration to duty are the merits relevant in a valid personnel action. See: Hanifan v. U.S., Ct.Cl. 1965, supra, 354 F.2d p. 364 (There is "[n]o ... requirement that the employee show that he would not have been discharged had he been accorded his procedural rights"; Camero v. U.S., Ct.Cl. 1967, supra,375 F.2d p. 777 (court noted it was irrelevant it had decided the "merits" previously against the employee); Ciambelli v. U.S., Ct.Cl. 1974, supra (agency contention it "would" have pursued an alternative, proper course of action rejected; "The Back Pay Act may not fairly be construed to permit foisting upon the plaintiff the well-nigh insuperable burden of negativing any other contingent actions the defendant might otherwise have taken if it had not taken the erroneous action it did," 203 Ct.Cl.

p. 687); Gratehouse v. U.S., 512 F.12d 1104, 1110, 206 Ct.Cl. 288 (1975) ("In sum, the purpose of a correction of that error can only be to determine the merits of the dispute prospectively."; Rasmussen v. U.S., Ct.Cl. 1976, supra, 543 F.2d p. 141; Ryder v. U.S., Ct.Cl. 1978, supra, 585 F.2d p. 487, ("As its last defense, the Government urges that plaintiff cannot have judgment ... if ... he would have been removed on the merits of the inefficiency charge against him in the absence of any procedural defect. However, ... the court has regularly taken the position that [such a] defect divests the removal ... of legality, leaving the employee on the rolls of the employing agency and entitled to his pay until proper procedural steps are taken ..."), Horne v. MSPB, D.C. Cir. 1982, supra (discussed supra p. 19-20).

f. An agency may retroactively correct a procedurally erroneous personnel action only if it does so promptly and within a reasonable time. See: Gratehouse v. U.S., Ct.Cl. 1975, supra, 512 F.2d p. 1109 ("[A]n agency has the inherent power to ... change a decision if it does so within a reasonable period of time ... [A]bsent unusual circumstances the time period would be measured in weeks, not years. Where a reasonable time for reconsideration has expired, there is no longer an opportunity to correct the procedural error retroactively, Vitarelli v. Seaton, Manzi v. U.S., 198 Ct.Cl. 489 (1972); Hanifan v. U.S. [Ct.Cl. 1965, supra]. This is true because, generally speaking, separation of an employee in violation of procedural regulations is illegal and void, except where it is harmless error. The employee,

in effect, was never separated, and never stopped drawing his pay," p. 1109).

The decision below stands alone, in overwhelming conflict with this body of federal personnel law principles developed since 1957 by authoritative federal appellate courts.

5. Nullification of the Veterans' Preference Act.

Upon affirming a de facto transfer of Van Sant's function to the Corps of Engineers, the Fourth Circuit also affirmed that Van Sant's release from the Postal Service in October, 1971, violated his transfer rights as a veteran under 5 U.S.C. §3503.[10]

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[10] §3503(a) then provided: "When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position," emp. sup., App. B2.

Effectively, from June 28, 1971, when the Corps detailees arrived, to December 7, 1971, Van Sant was continuously denied his statutorily right of transfer to another agency.[11]

Nevertheless, the decisions below give no consideration to appropriate VPA relief, while limiting redress to back pay during the time period only of the Act's active violation. This relief disregards that the statutory "purpose of §12 [of the VPA] was to protect veterans ... affected by transfers of function from one agency to another," Colbath v. U.S., 341 F.2d 626, 169 Ct.Cl. 414, 420 (1965), and the Act was enacted because "Congress was primarily concerned with the problems caused by major government reorganizations,"

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[11] If transferred, Van Sant's future retention with the federal government is not determinable, but four of the five detailed Corps architects remained in federal service as of the 1983 hearing.

McNamara v. Dick, D.C. Cir. 1963, 323 F.2d 276, 278, cert. den. 375 U.S. 895.

In the sole Court of Appeals decision to date expressly interpreting proper relief for a violation of §3503(a), the D.C. Circuit directed compliance with a Civil Service Commission order to reinstate, to the agency performing his function, a veteran wrongfully denied a transfer and separated eleven years earlier, Feldman v. Herter, D.C. Cir. 1960, 276 F.2d 485. The governing consideration, as the D.C. District Court has said recently, is that "Section 3503 could not be any more specific; when there is a transfer of functions, individuals who are entitled to the protection of the Act ('preference eligibles') must be assigned positions before others can be appointed," emp. by the court, Ross v. U.S., 566 F.Supp. 1024, 1027 (1982).

The 1971 substitute-release-notice ordered below does violence to the Congressional intent behind legislation designed to give employment security to a class of federal employees. (A security Congress generalized in 1978 to "each competing employee," 1978 Civil Service Reform Act §§307(f) and 907, 92 Stat. 1149, 1227). The Fourth Circuit's emasculation of public policy embodied in this protective statute directly conflicts not only with Feldman v. Herter, supra, but with the progeny of Service and Vitarelli cases cited above. For there can be no justification for awarding less relief to statutorily protected employees than to employees wrongfully separated for other reasons.

II. It is a violation of stare decisis and due process for a Court of appeals to affirm summarily a retroactive judicial-substitute personnel action without citing authority or offering a

basis of reconciliation with Congressional statutes and authoritative decisions directly in conflict.

The Court of Appeals in this case has affirmed a District Court substitute agency personnel action made retroactive over a dozen years without any discussion of applicable statutory law or judicial precedent, in a summary, not-for-publication disposition. (See Fourth Circuit I.O.P's 36.3 and 36.4, App. B19.) Rehearing, strongly urged, was denied without explanation. Subsequently, the Court of Appeals also denied a Van Sant motion for publication.[12]

As explained supra, part I, decisions

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[12] Citing, inter alia, the effect of non-publication on discouraging review by this Court, noted by Reynolds & Richman in "The Non-Precedential Precedent - Limited Publication and No-Citation Rules in the United States Courts of Appeal," 78 Colum. L. Rev. 1167, 1202-03 (1978). Within the Fourth Circuit unpublished decisions have only limited precedential use under local I.O.P.36.5, App. B20.

of this Court preceding the Back Pay Act of 1966, and a long progeny of cases thereafter, have held consistently that it is not the province of a federal court to try to salvage improper agency personnel actions, and that a separation in violation of statutory law must be treated as a nullity requiring the employee's restoration to duty.

Nevertheless, the Fourth Circuit has acted, shockingly, as if there is no need for a legal basis to affirm the extraordinary substitute personnel action issued in this case. And it has rendered its hasty, arbitrary, unsupported disposition in a manner least likely to be given public scrutiny. This procedure is not far from the evils of Star Chamber proceedings.

On June 8, 1984, a distinguished Advisory Committee on Procedures to the

U.S. Court of Appeals for the D.C. Circuit submitted to that Circuit an analysis, report, and recommendations on the practic of issuing unpublished dispositions by the D.C. Circuit. The Committee strongly recommended that the practice of issuing unpublished dispositions having no precedential value be abolished. It gave as significant reasons, inter alia, the following:

> "[W]ithin our judicial framework stare decisis has historically promoted judicial legitimacy by insisting that each decision be constrained by precedent and itself constrain future dispositions. When a decision is neither published nor accorded precedential effect, public scrutiny is minimized, and a safeguard against unfair decisions is eliminated." Report p. 9.

An attached Subcommittee report stated:

> "The issuance of unpublished opinions that cannot be cited as precedent is fundamentally inconsistent with the doctrine of stare decisis. In theory, stare decisis promotes judicial legitimacy by insisting that

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the decisions of a court not result from the individual preferences of the decisionmaker, but rather flow from precedents that, over time, have been honed to generate just results. Judicial opinions serve an essential function under this scheme by demonstrating how the precedents produce the results in particular cases. Such demonstrated adherence to precedent increases public acceptance of judicial decisionmaking by reassuring the parties, as well as interested observers, that their interests have not been affected in any arbitrary or invidious manner." Cte. Rept. (p. 21-22)

The Subcommittee remarked further:

"The jurisprudential and administrative problems posed by the Court's unpublished opinion rule may also have constitutional dimensions... The due process clause of the fifth amendment guarantees a right to procedural regularity, as well as a substantive right to freedom from arbitrary governmental action. Finally, the equal protection safeguard implicit in the fifth amendment guarantees a right to equal treatment for those who are similarly situated, in the absence of a compelling governmental interest warranting disparate treatment. The Court's unpublished opinion rule can be viewed as inconsistent with the objectives of [these] provisions." (p. 35)

There is no doubt that in <u>this</u> case the failure of the Fourth Circuit to confront

stare decisis requirements has led to an unfair summary disposition imposing arbitrary, disparate treatment on Van Sant in plain violation of due process, public policy and decisions of this Court.

CONCLUSION: RELIEF SOUGHT

This case presents a clear abuse of summary affirmance authority in violation of decisions of this Court, public policy and due process. Under the circumstances, this Court at a minimum should grant the petition for certiorari, summarily vacate the judgment below, and remand for Court of Appeals reconsideration of the relief due Van Sant for wrongful separation from federal service in light of this Court's decisions in SEC v. Chenery Corp., Service v. Dulles, Vitarelli v. Seaton, and Murray v. Sampson, supra.

Since, however, the decisions of this Court just cited, and the decisions by

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other authoritative federal courts presented herein, establish that the retroactive judicial-substitute agency release notice issued below was invalidly issued, this Court may also, appropriately in this case, summarily vacate the judgment below and direct the Court of Appeals to order reinstatement and other relief to Van Sant consistent with SEC. v. Chenery Corp., Vitarelli v. Seaton, and the Back Pay Act of 1966.

Alternatively, petitioner urges the Court to grant the petition and give the case plenary consideration.

Respectfully submitted,

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December 24, 1985

Certificate of Service

I hereby certify that three copies of the foregoing petition were mailed, first class mail, postage prepaid, this ___ day December, 1985 to : (a) the Solicitor General, Department of Justice, Washingto D.C. 20530; and (b) counsel of record for defendants, Kevin B. Rachel, Esq., Office Labor Law, U.S. Postal Service, 475 L'Enf Plaza, Washington, D.C. 20260-1131.

Edward Earl Wright
Attorney for Petitione

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2387(L)

Victor Van Sant,

Appellant,

versus

United States Postal Service;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellees.

No. 85-1007

Victor Van Sant,

Appellee,

versus

United States Postal Servics;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (C/A 84-417)

Argued: July 18, 1985

Decided: August 29, 1985

Before WINTER, Chief Judge, and WIDENER and WILKINSON, Circuit Judges.

PER CURIAM:

This is the fourth appeal in Victor Howard Van Sant's suit against the United States Postal Service, et al., resulting from the termination of his position as a "planning architect" with the Service. Van Sant claims violation of his rights under the Veterans' Preference Act of 1944, 5 U.S.C. § 3503(a), and under 5 C.F.R. § 351.201 et seq. of the civil service regulations. In the first appeal, we held that the Civil Service Commission had failed to develop a sufficient evidentiary record to justify its conclusion that Van Sant had not been denied any of his rights. We therefore directed the district court to remand the case to the Commission for a complete evidentiary hearing. Van Sant v. United States, No. 78-1583 (4 Cir. Sept. 7, 1979) (unpublished).

The Civil Service Commission (now the Merit Systems Protection Board (MSPB)) con-

ducted a hearing and again sustained Van Sant's separation. Van Sant sought to appeal directly to us, but we dismissed the appeal for lack of jurisdiction. Van Sant v. United States, No. 80-1531 (4 Cir. April 28, 1981) (unpublished). Van Sant then properly appealed to the district court, which affirmed the MSPB decision sustaining Van Sant's removal.

In a third appeal to us, we again reversed the judgment and directed that the case be remanded to the MSPB for a further evidentiary hearing. Van Sant v. U.S. Postal Service, No. 82-1305 (4 Cir. Mar. 24, 1983) (unpublished). We stressed that our repeated remands to MSPB were for the agency to take a realistic rather than a technical view of Van Sant's employment treatment. Specifically, we directed MSPB to determine if in fact employees of the Corps of Engineers (COE), to which Van Sant's job functions were purportedly transferred, con-

tinued to perform those functions for the Postal Service after Van Sant was discharge and if so for what period of time.

After the last remand, MSPB again upheld the validity of Van Sant's discharge. The district court affirmed in part and reversed in part--correctly, we think. The MSPB found that after Van Sant received his termination notice (August 27, 1971) "essentially there was no dispute" that COE employees were detailed to the Postal Service to perform his job function until December 7, 1971. Notwithstanding the MSPB's legal opinion that this did not constitute a transfer of function, the district court discerned the reality of what occurred: "the same FDS work--Van Sant's work--was still being done; it was simply being done by COE personnel." The district court therefore ruled that it was only from December 7, 1971, the date that COE employees last performed Van Sant's former

job function, "that plaintiff's termination can be valid." It rejected Van Sant's argument that his job continued after that date, concluding that his various duties were validly dispersed among other positions. It awarded Van Sant the pay he would have received from his date of release (October 12, 1971) to the time that he would have been released had he received a notice of termination of December 7, 1971.

We agree with the factual and legal conclusions of the district court. We see no merit in Van Sant's contention that he is entitled to reinstatement and back pay to the date of reinstatement. We affirm on the memorandum opinion of the district court. Van Sant v. United States Postal Service, Civil Action No. 84-417-A (E.D. Va. October 24, 1984) (unpublished). AFFIRMED.

*Van Sant appeals from the part of the judgment limiting his relief. He contends that he is entitled to reinstatmeent and back pay until the effective date of reinstatment. The Postal Service appeals from the part of the judgment awarding Van Sant back pay for a limited period.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-417-A
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

MEMORANDUM OPINION

This action is an appeal from a January 10, 1984 decision of the Merit Systems Protection Board (MSPB). The issues raised on appeal relate to the propriety of the plaintiff's October 12, 1971 termination through a reduction in force (RIF) of his employment as a planning architect with the United States Postal Service (USPS).1/ These issues have been the subject of

1/ Notice of the termination was given on August 27, 1971, but the plaintiff's last day of work was originally October 5, 1971 and by extension October 12, 1971.

two prior appeals. The first resulted in an opinion of this court affirming the original MPSB decision to uphold plaintiff's termination, which MSPB issued on August 1, 1973. Van Sant v. United States, Civil Action No. 77-756 (E.D.Va., decided April 27, 1978) (Van Sant I). The United States Court of Appeals for the Fourth Circuit reversed that decision remanding the case to the MSPB for a further evidentiary hearing. Van Sant v. United States, Appeal No. 78-1583 (4th Cir., decided Setember 7, 1979) (Van Sant II). The evidentiary hearing on remand again resulted in a decision adverse to the plaintiff. Van Sant v. United States Postal Service, MSPB Case No. DC035100006 (decided June 11, 1980) (MSPB I). That was appealed, with this court affirming. Van Sant v. United States Postal Service, Civil Action No. 81-769 (E.D.Va., decided February 11, 1982 (Van Sant III). The Court of Appeals again reversed and remanded for a

more complete evidentiary hearing. Van San v. United States Postal Service, Appeal No. 82-1305 (4th Cir., decided March 24, 1983) (Van Sant IV). Pursuant to this remand the MSPB conducted a two-day hearing on Novembe 28 and 29, 1983. The plaintiff, now represented by counsel, appeared and testified, and his counsel cross-examined witnesses of the USPS. The plaintiff now seeks review o the MSPB's decision following that hearing, which once again upheld plaintiff's termination. Van Sant v. United States Postal Service, MSPB Case No. DCO351802006REM (decided January 10, 1984) (MSPB II).

The court has read the transcript of th two-day hearing as well as referred to the exhibits and portions of the previous hearings where so directed by counsel and where necessary to resolve the issues presented.

Transfer of Function

Prior to his termination, plaintiff was a "planning architect" in the Plant Engineering Branch of the Research and Development Department of the United States Post Office (POD). The "planning architect" is to be distinguished from the "design architect." The latter refers to professional architects with responsibility for detailed architectural and aesthetic design in the Department of Facilities in the POD. The former, of which plaintiff was one, and as their task the development of "functional design specifications" (FDS). The plaintiff, who is not a professional architect, insists that no official distinction is made between a planning and a design architect; but neither does he dispute that the planning architect's job did not require the skill or training of a professional architect. The MSPB found, and the record supports this finding, that FDS tasks were a separate function not transferred to the

Corps of Engineers (COE) when, on June 29, 1971, the POD transferred to the COE the responsibility for the tasks performed by the "design architects." Apparently the plaintiff did not argue to the contrary before the MSPB (see MSPB II at 4-5), although he does in this appeal.

The POD group to which the plaintiff di belong was the Plant Engineering Branch for Research and Development. As a "planning architect," the plaintiff's tasks included preparing drawings that would outline site dimensions, parking facilities, size of buildings, look-out arrangements, and computation of square footage per personnel, some of which were prepared even before a particular postal facility site was selected. Certain FDS work, such as system layout, was apparently reserved for Industrial Engineering Technicians (IET's) even before the plaintiff's loss of position. In contrast, the design architects

who were transferred to the COE belonged to another branch, the Bureau of Facilities. They were the professional architects concerned with the actual building design and construction, tasks not within the plaintiff's responsibility or expertise.

The June 27th transfer was part of a plan for COE to take over construction responsibilities formerly held by the POD. Thereafter, the POD (which became the USPS several days later on July 1, 1971) had as its primary concern moving the mail. To this end it had a diminished interest in and responsibility for buildings and structures.

Following the July 1, 1971 reorganization of POD into the USPS, the Research and Engineering Department was abolished, and the planning architects were trnasferred to the Mail Processing Branch of USPS. Consistent with USPS's diminished responsibility for building design and constructin, there were no architectural, design or

planning, tasks for the plaintiff to perform. Were this all, the termination of th plaintiff and the other planning architects on grounds that "no other work [was] available" would be unassailable on the merits, since it is clear that no other per manent, full-time position was estabished i any competitive area for which the plaintif qualified.2/

Detailing of COE Architects to USPS

The Plaintiff's principal argument is that, on June 28, 1971, COE "detailed" eigh employees, four of whom were architects,3/ to the USPS Mail Processing Group to do FDS work, which in reality had been plaintiff's work. These four architects were former PO employees that were among the 136 employees previously sent to COE with the transfer of

2/ The plaintiff contests this, as will be discussed infra, pp. 7-11.

3/ The other four were engineers, and thei status, according to the plaintiff, is not relevant to the issues before the court.

the POD Department of Facilities design and construction function. Since the four "detailees" were still performing FDS work for the USPS at the time of the plaintiff's August 27, 1971 termination notice, the plaintiff asserts that the FDS function had in fact been transferred to COE. As a consequence, of course, he would retain his Veterans preference and could not have been "RIF'd," as pointed out in previous opinions in the case.

It is not necessary for the court to adopt the plaintiff's position as far as actual transfer of function to the COE is concerned. It finds that, under the reality test set forth by the Court of Appeals in its March 24, 1984 remand decision, the plaintiff can, at least to some extent, prevail.

The first question of what work was being done by those "detailees" is a question of fact. The decision of the MSPB

on this aspect of the case is, in part:

> These employees [detailees] performed work being done in the Mail Processing Group, including functional design specification work. The 1980 decision in this case set out in detail that at the time of this detail, the appellant's responsibilities were to develop functional design specifications (FDS) for postal facilities. See pages 2 and 3. Of concern in this appeal is the fact that appellant was RIF'ed because there was no other work available while COE employees were doing FDS work on detail

MSPB II at 4.

> There is, however, essentially no dispute about what the nature of the assignments given the COE architects [detailees] was. In 1980, the appellan and the USPS stipulated that if those COE employees who had been detailed wer to testify they would verify that they were detailed and that while on detail worked on FDS packages. At the most recent hearing two of these former detailees did so testify. See testimon of Blanchard and Carnahan. In addition records were reviewed with regard to th other architect detailees, Messrs. Miller, Milaknis and Dickerson. This testimony was concurred in by their former COE supervisor, Mr. Barnes, and by the USPS official, Mr. Weirnicki. Also, Mr. Weirnicki's August 1, 1971 request for an extension of the details reflects the COE employees would be doing FDS packages. Appellant's Motion for Summary Judgment.

MSPB II at 7.

The decision then, in conclusory terms, points out that:

> The detail of some employees to an office whether in their employing agency or another, does not constitute a transfer of function as there is no transfer of the function from one competitive area to another.

MSPB II at 7.

This begs the second question of what constitutes a transfer. The issue is not whether there is some formal transfer of function, but whether the detailing of these four architects to do work which the plaintiff could and had been doing was in reality a transfer of those architects (see Van Sant IV at 8). If so there was "other work available." The court does find a transfer in reality because the same FDS work - Van Sant's work - was still being done; it was simply being done by COE personnel.

The MSPB further states that detailees of COE could not be RIF'd by USPS because they did not work for USPS, and consequently were not similarly situated for purposes of

determining whether employees lacking the plaintiff's preference must be RIF'd before the plaintiff. This again ignores the reality of the situation, lifting form over substance.

Finally, the Court of Appeals directed on remand that inquiry be made into the length of time the "detailees" worked for the USPS. The MSPB found that the last of them completed his "detail" on December 7, 1971. The record supports this, as well as the finding that thereafter "no other work [was] available" because neither the plaintiff's position nor his former task was continued and because the detailees were no longer in the plaintiff's competitive area.

In summary, it is only from the December 7, 1971 date that the plaintiff's termination can be valid. He is therefore entitled to the pay he would have received from October 12, 1971, the day he was released, until the time he would have been

released had a notice of termination been given him on December 7, 1971.

IET

The plaintiff alternatively argues that the FDS work, if retained by USPS, did not just disappear, but had to be done by someone.4/ It is true that after October, 1971, the FDS duties were absorbed by the Engineering Systems Design Branch of the Mail Processing Group of USPS; however, the specific disciplines in that branch were engineering and performed by IET's. Since the FDS duties were basically planning rather than architectural duties, the plaintiff claims that he should have been considered for one of these IET positions.

The defendants reply that the issue of plaintiff's being considered for an IET position is not before the court; that it is

4/ The MSPB, in its January 10, 1984 decision concluded that the 1980 decision that plaintiff's work had been contracted out was in error, and that this work had not been contracted out.

not within the terms of the remand from the Fourth Circuit; and that the plaintiff did not raise the issue before the MSPB in the latest hearing until his post hearing brief.

In deciding whether this issue can now be heard, the court notes the plaintiff first raised it before the Civil Service Commission (CSC) in 1972. In rejecting the plaintiff's position, the CSC Appeals Examining Office, on March 11, 1972, stated the following:

> With regard to the PS-895-14 Industrial Engineering Technician positions occupied by Messrs. John J. and Louis W. Huff, we find that your education, training, and experience show your qualifications to be preponderantly in the area of Architecture. It appears that your main emphasis has been planning and designing structures whereas the Industrial Engineering Technician position as utilized by the U.S. Postal Service requires the design and evaluation of mail-flow systems within postal structures.

MSPB I, Ad. Rec. Part I at 156.

While not specifically addressed in the complaints filed in this court, the issue was again raised in 1980 when the Appeals

Officer explored the question of what work the Mail Processing Department was doing after it absorbed the duties of the Research and Engineering Department. At that hearing the following colloquy occurred between the Appeals Officer and the witness Clements, a structural engineer with the USPS in 1971:

Q. The Research and Engineering Department was abolished approximately the same time, or some time in the fall of 1971, is that correct?

A. I guess it did, yes. It was abolished July 28, 1971 and became Mail Processing.

Q. It became Mail Processing. There had not been a Mail Processing prior to that, is that correct.

A. I'm not sure about that. We went through so many organizational changes.

Q. But it is true that the Mail Processing Department took over the functions of the Research and Engineering Department?

A. This is correct.

Q. Okay. And the duties that Mr. Van Sant performed in Research and Engineering were, then, performed by the Mail Processing Division?

A. Right.

Q. And who performed those duties in the Mail Processing Division?

A. Well, Mr. Van Sant and people tha had been in Research and Enginnering.

Q. After the architects separated by reduction of force, who performed those duties?

A. Practically all of it, if not all of it, went to an outside consultant.

Q. And the planning?

A. The planning work, like Mr. Van Sant was doing.5/

MSPB I, Ad. Rec. Part III at 76-77.

At the most recent MSPB hearing the Appeals Officer stated at the outset that "... the pleadings, the materials which ha been previously submitted in previous considerations of this matter are already in eivdnece and will be considered...." MSPB II, Ad. Rec. Part IV at 12. Moreover, the plaintiff's counsel made it clear that the IET argument was part of the plaintiff's case. MSPB II, Ad. Rec. Part IV at 89-90.

5/ As previously indicated, this was prove to be incorrect.

Certainly the remand of the Court of Appeals did not foreclose consideration of the issue. While specifying certain issues to be addressed on remand, it directed the MSPB to make findings of fact on those "and any other relevant issue." Van Sant IV at 10.

Finally the MSPB did address the issue in the following language:

> I find that the preponderance of the testimony, including the appellant's, and the documentary evidence indicates that following the RIF, no one took over the "position" which the appellant had occupied. Rather the duties (sic) responsibilities which had been assigned to the appellant were absorbed into other positions in the new Engineering Systems Design Branch. Some duties were included in the project manager's position. Most of the drawing and drafting duties were assigned to various engineering technicians. Agencies generally have the authority to organize as they deem appropriate.

MSPB II at 11.

Consequently the court finds that the IET issue is properly before it.

The plaintiff's argument, however, was initially rejected on March 11, 1971 by the

CSC Appeal Examining Office in the language quoted above, and the records bear out the Commission's judgment. The "architectural" duties of the FDS did not "have to be done by someone" in the sense that one individual take over plaintiff's work. Instead the FDS duties could be split among several individuals and that apparently is what has happened here. After the reorganization, the planning duties of the plaintiff were taken over by the IET's, variously referred to as Huff, Ruff and Simmons, who were qualified to perform systems engineering, which they continued to do, and who apparently were also qualified to do the planning work. The plaintiff was qualified only to do the planning work, yet now seeks to have one of the IET's, while doing work the plaintiff cannot do, "bumped" in his favor.

There is no obligation, however, on the part of the USPS to accommodate the plaintiff by separating the planning from the

systems work so he will have a full time job. The USPS could use its business judgment to organize itself so that the IET's jointly shared in the FDS Work. There was just no place for an "architect" with the plaintiff's credentials in the reorganized Postal Service, and the Service was not required to create one.

Procedural Arguments

Much of the plantiff's argument as to the procedural deficiencies of his termination has to do with the formal validity of the "detailing" and the failure to include the detailees within the plantiff's competitive area. These have been resolved in prior parts of this opinion. Plaintiff has shown no deficiency in procedures used to carry out the RIF.

Conclusion

For the foregoing reasons the decision of the MSPB will be affirmed except to the extent that it found the plaintiff's notice

of termination to be proper as of August 2 1971. The proper date for notice of termination is determined to be December 7, 1971.

/s/ A.V.B.,J.
United States District Judge

Alexandria, Virginia
October 24, 1984

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-417-A
UNITED STATES POSTAL SERVICE, UNITED STATES CORPS OF ENGINEERS, and MERIT SYSTEMS PROTECTION BOARD, Defendants.	)	

O R D E R

For the reasons set forth in the Memorandum Opinion this day filed, it is

ORDERED that the January 10, 1984 decision of the Merit Systems Protection Board is reversed only insofar as it determined that the proper date of the plaintiff's notice of termination was August 27, 1971, the court now determining that the proper date for the notice of termination is December 7, 1971. In all other respects the said decision is affirmed. And it is further

ORDERED that the plaintiff be paid addi
tional salary and benefits which he would
have been paid had the notice of terminati
been given on December 7, 1971 instead of
August 27, 1971.

/s/ A.V.B.,J.
United States District Judg

Alexandria, Virginia
October 24, 1984

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

VICTOR H. VAN SANT,	)	
	)	CASE NUMBER
	)	DC03518020006REM
	)	
v.	)	DATE JAN 10 1984
	)	
U.S. POSTAL SERVICE	)	
U.S. DEPARTMENT OF THE ARMY	)	
	)	
	)	

INTRODUCTION

Pursuant to the March 24, 1983, order of the United States Court of Appeals for the Fourth Circuit, the district court for the Eastern District of Virginia, on April 26, 1983, remanded this case to the Board to develop the record further and again consider Mr. Van Sant's appeal from a reduction-in-force action whereby he was separated from employment with the U.S. Postal Service effective October 12, 1971.

BACKGROUND

The appellant was employed in the U.S. Postal Service in a position of Architect, PS-808-15. The reduction in force (RIF) at issue came about after the reorganization of the former Post Office Department (POD) into the U.S. Postal Service (USPS), 39 U.S.C. § 1001. The appellant appealed from the RIF to the former Civil Service Commission. The appellant contended, inter alia, that his function had been transferred to the U.S. Corps of Engineers and that he had improperly been denied the opportunity to transfer with his function. The Civil Service Commission found that the appellant's function had not transferred and affirmed the RIF action. The appellant exhausted his administrative remedies in 1972. In 1973, Mr. Van Sant requested that the Civil Service

Commissioners exercise their discretionary review authority and reopen and reconsider his case. This request was denied November 23, 1973. Mr. Van Sant made the same request in 1975 and the previous denial was renewed. In 1978, the appellant appealed the Commission's decision to the district court. On June 21, 1979, the district court's decision granting summary judgment for the government was reversed by the Court of Appeals for the Fourth Circuit and the case was remanded to the Board to conduct "a complete evidentiary hearing on the issue of whether Van Sant's job function was transferred to the Army Corps of Engineers or to any other department and whether, if so, Van Sant was entitled to a transfer to the receiving agency." A hearing was conducted on March 25, 1980. On June 11, 1980, a decision was issued finding that the appellant's function was

not transferred to the Army Corps of Engineers. The failure to identify the appellant for transfer was affirmed. This decision erroneously informed the appellant that he had again exhausted his administrative remedies and the appellant again appealed to the district court. The district court affirmed the Board's decision, but the Court of Appeals again reversed that decision and remanded the case to the Board with the following instruction:

> On remand it is the obligation of the MSPB to develop fully a record directly addressing the issues in dispute between Van Sant and the Service. These issues include, but are not limited to, the actual nature of the work performed by the Corps architects detailed to the Service, the reasons for assigning that work to those persons rather than to Van Sant, the time period during which the Corps employees worked at the Service, the date of the Service decision to abolish the planning function, and the date of its actual abolition. On these, and any other relevant issues, the MSPB is to make the findings of fact

necessary for a final resolution of this unduly prolonged litigation.

At this stage of the case, the Department of the Army Corps of Engineers (COE) made an appearance. USPS and COE requested that a further hearing be held. The appellant made no objection although he did file a motion for a summary judgment. That motion was taken under advisement and will be considered at this time. A further hearing was conducted on November 28 and 29, 1983, at which all three parties were present. The parties were thereafter provided until December 15, 1983, to file final representations. In that closing statement, the appellant identified the issues in dispute at this time as his contentions that he was improperly denied a transfer either to a position in COE or USPS and that his RIF separation was done in violation of the

rights granted him at 5 C.F.R., Part 351. 1/

ANALYSIS AND FINDINGS

Prior to the establishment of USPS, the appellant worked with POD in a position of Architect, GS-808-13, Research and Engineering Department, Engineering Directorate, Systems Engineering Design Division, Plant Engineering Branch. Appellant's Exhibit B-3. With the establishment of USPS on July 1, 1971, the Research and Engineering Department was abolished. The appellant was given a copy of a mass change notice dated July 28, 1971. Tab 19, 1980 Appeal File. The appellant then

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1/ Unless otherwise specified regulatory and statutory references are to those provisions in effect in 1971. See also Section 902 (b) of the Civil Service Reform Act of 1978, Pub. L. No. 95-454 (Oct. 13, 1978).

worked in the Mail Processing Department and was given a USPS position designation of PS-808-15. See Tr., 1980 Hearing, p. 16. The appellant was issued a RIF notice on August 27, 1971. That notice informed him that a RIF was being conducted incident to the Postal reorganization and that his name had been reached for release from his competitive level. The agency found no position which could be offered to the appellant.

In March, 1971, the POD had entered into an agreement with COE to provide for Postal Facilities Acquisition Services. Tab 19, 1980 Appeal File. Under this agreement COE would be responsible for the design and construction of Post Office buildings. The Post Office identified this function as one which had been accomplished by the Post Office Department of Facilities and transferred

some 136 employees to COE's Postal Construction Support Office with this function. See Appellant's Exhibits B-6 and 7 and COE Exhibits. Approximately five of these employees were architects. See 1980 decision, at page 3. This transfer occurred on June 28, 1971. Simultaneously eight of these 136 employees were detailed to the Mail Processing Branch of USPS. Of these employees, four were architects. These employees performed work being done in the Mail Processing Group, including functional design specification work. The 1980 decision in this case set out in detail that at the time of this detail, the appellant's responsibilities were to develop functional design specifications (FDS) for postal facilities. See pages 2 and 3. Of concern in this appeal is the fact that the appellant was RIF'ed because there was no other work available

while COE employees were doing FDS work on detail.

All of the documents in the record concerning the agreement between USPS and COE reflect that COE assumed the design and construction function while the USPS retained the FDS function. As relied upon in the 1980 decision and quoted by the appellant, himself, 2/ to show that the FDS work was not transferred to COE, the March 11, 1971 agreement provided:

> For each project on which the Corps' design services are requested, the USPOD will provide the Corps with applicable project design standards, specific design criteria, general functional requirements...and any descriptive material or sketches needed to define the general quality of construction, space allocation, functional layout, and operating characteristics to be incorporated into the design of the project.

2/ Appellant's Motion for Summary Judgment, p. 15.

The appellant, himself, described the above as, "in other words, the FDS package." I find no evidence that the USPS/COE agreement transferred the appellant's function to COE, nor that he gained any right to transfer to COE under that agreement. In the post-1980 proceedings challenging the RIF the appellant has not, in fact, so argued. The appellant argues that his assignments were taken over by COE employees when eight transferrees were detailed to his office. He contends that since they did his work, developing FDS packages, his work was taken over by COE also and that he was thereby also entitled to transfer to COE. In brief, the appellant contends that in the summer and fall of 1971, there were some eight or nine architects in the Mail Processing Group preparing FDS packages, the appellant and three other USPS employees, plus four or five

COE employees on detail. Of these employees, half were RIF'ed by USPS while the other half were reassigned to positions in COE. The appellant asserts that he, as a veteran, should have been offered another position over any COE nonveteran.

To consider this matter, a definitive understanding of the term "function," must be reached. This term is defined by regulation and is not interchangeable, as the appellant has used it, with such other terms as "position," "assignment," or "task." Without insistence on specificity and precision concerning terms of art, the subsequent analysis would be meaningless. The origins of the term "function" evolved from the Reorganization Act of 1939 (53 Stat, 562) and the Veterans' Preference Act of 1944. Unfortunately, neither of these statues defined function. Subsequently, the

Civil Service Commission defined function as "all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed." 5 C.F.R. § 351.203(c). This definition was in effect in 1971.

Through the examination of various applications of this term, I can obtain greater detail and guidance to use in applying this term to the facts presented by this case. In McNamara v. Dick, 323 F.2d 276 (D.C. Cir. 1963), cert. denied, 84 Sup. Ct. 171 (1963), the court strongly hinted that the term had to be associated with the "authority, powers and duties" that an agency was "expressly authorized by law" to perform. Therefore, a function has to be a clearly identifiable activity of the agency's mission which consists of authorities, powers, and duties which combine to form

a segment of the agency's mission. To qualify as a function, the "authority, powers, and duties, must be substantial and authorized by law. The resulting activity must be integral to the agency's mission." Enos v. Macy, 321 F.2d 748 (D.C. Cir. 1963). In addition, there must be either a quantitative or qualitative method of identifying the activities as functions. This is necessary in order to ensure the envisioned traceability aspects of a function from one entity to another when the function is transferred from one agency to another.

It is the functional activities that are described in an agency's enabling legislation, organization manuals, and delegations of authority that are clearly identifiable and of most significance in determining whether a function has been transferred. The foregoing documents describe in detail the general activities

that form the nucleus of the agency missions from which all other activities stem.

Once the functions of any two entities are isolated in this fashion, it is then merely a matter of tracing the function of one entity to the other and drawing conclusions about whether or not the functions have been transferred. 3/ This is what is envisioned by the transfer of function regulations for they define a transfer of function as "the transfer of the performance of a continuing function from one competitive area and its addition to one or more other competitive areas." 5 C.F.R. § 351.203 (h)(1).

3/ 5 C.F.R. § 351.302(b) provides that a function transferred solely for liquidation does not entail any retention benefit to the employee identified with the liquidated function.

Another "term of art" is "position." This term is defined by statute. A "position" means the particular aggregate of work, consisting of duties and responsibilities, assignable to an employee. 5 U.S.C. § 5102(a)(3). As defined in the 1980 decision, a detail is a "temporary assignment of an employee to a position, different from that in which he is regularly assigned,...." 1980 decision at 6.

Applying the above to the instant case, I find that preparation of FDS packages generally may be considered a function within the meaning of 5 C.F.R. § 351.203. From review of the appellant's representations in this case, and that portion of the remand order quoted above, it is apparent that the appellant considers a determination of the nature of the assignments given the COE detailees material to a determination of whether this function was transferred to COE.

There is, however, essentially no dispute about what the nature of the assignments given the COE architects was. In 1980, the appellant and the USPS stipulated that if those COE employees who had been detailed were to testify, they would verify that they were detailed and that while on detail worked on FDS packages. At the most recent hearing two of these former detailees did so testify. See testimony of Blanchard and Carnahan. In addition, records were reviewed with regard to the other architect detailees, Messrs. Miller, Milaknis, and Dickerson. This testimony was concurred in by their former COE supervisor, Mr. Barnes, and by a USPS official, Mr. Weirnicki. Also, Mr. Weirnicki's August 1, 1971 request for an extension of the details reflects the COE employees would be doing FDS packages. Appellant's Motion for Summary Judgment. The detail

of some employees to an office whether in their employing agency or another, does not constitute a transfer of function as there is no transfer of the function from one competitive area to another. See 5 C.F.R. § 351.203(i).

As stated above, on July 1, 1971, POD ceased to exist and USPS came into existence. On July 1, 1971, the appellant became an employee of USPS. On July 1, 1971 the detailees, specifically, Miller, Milaknis, Carnahan and Blanchard, were officially employees of COE. The former Executive Assistant to the Assistant Postmaster General for Research and Engineering, Mr. Linneman, testified that incident to the establishment of USPS, the former Bureau of Facilities was still with POD, the Bureau of Research and Engineering and the Bureau of Operations were mass transferred into the Mail Processing Group. Thereafter, the actual

organizational configuration of the Mail Processing Group was established. The former director of headquarters personnel testified at the 1980 hearing that the entire Postal Service was reorganized. He also testified that the usual manner of effecting such a reorganization is to establish the organizational configuration and then determine how many and what kind of position will be needed. See 1980 Tr. p. 40.

As testified to by Mr. Linneman, there is no architectural function identified in the Mail Processing Group function statement. See Page 67, Original Appeal File. There was no architect positions established in the Mail Processing Group. The appellant and three other USPS architects assigned to the Mail Processing Group were all then issued RIF notices and identified to be separated in the RIF. All were for the

same reason, "no other work available;" Mr. Linneman testified that this term was used to mean that there was no permanent, full time position established in the competitive area for which the employee qualified. The appellant's PES-808-15 architect position was thus, not abolished. Rather, the USPS never established such a position in the Mail Processing Group once the organizational configuration was settled. I find that there were no architect positions to which the appellant and the other USPS architects could be assigned. The detailees from COE, however, could not be RIF'ed by the USPS as they no longer were employed by them. Thus, they were not similarly situated with the appellant.

There is also some question as to whether the fact that FDS work was being done by the detailees made it COE work. Both Mr. Blanchard and Mr. Carnahan tes-

tified that they worked for USPS supervisors while on the detail, receiving assignments from them and submitting the completed work to them. Mr. Barnes testified that under the USPS/COE agreement, COE would be sent a Request for Services by USPS. As set forth above, this would include the functional design specifications. Upon receipt of such a request, COE would make a technical review of the FDS and then send the request to the field for the award of an architectural/engineering contract. COE was then responsible for the construction of the project. It was to return a completed facility to USPS. Messrs. Barnes and Wiernicki agreed in testimony that the purpose of the details was to have additional help with FDS packages and thereby quickly get as much work as possible to COE to get them involved in Postal construction. Mr. Wiernicki had

been the Chief, Planning Branch until June 1, 1971 at which time he became the Acting Manager, Process Engineering Division, Engineering and Logistics Department, Mail Processing Group. He continued acting in that position until the RIF (October 5, 1971).

Mr. Wiernicki testified that the detail of the COE employees was requested by Mr. T. Kite of the Office of Project Management, USPS. Mr. Blanchard testified that he spent a significant portion of his time on the detail making flip charts for Mr. Kite. These witnesses and Mr. Barnes also indicated that after the details, when they went to any COE, position, they did not do FDS work. I find that the COE employees detail to the appellant's office were assigned USPS work, that they worked for USPS officials and that when the details ceased, they no longer did FDS work, nor

did they continue to report to USPS supervisors. I further find that the FDS work was at no time transferred to COE, but was always the responsibility of USPS. 4/

I come then to the questions of when the details ended and whether the FDS function was contracted out to private contractors. The appellant argues that he was improperly denied a transfer from POD to a continuing position in the USPS.

4/ It has also been contended that the FDS function transferred to COE after the appellant was RIF'ed because in a 1972 affidavit in a discrimination complaint investigation, Mr. Wiernicki stated that "the architectural work is now performed by the Corps of Engineers." Mr. Wiernicki testified that he only meant that any architectural work, i.e., that connected with the construction of postal facilities, had been transferred to COE, and that there were no architect positions established in the Mail Processing Group. He did not thereby mean that the FDS work had been transferred to COE, nor that as of 1972, FDS packages were being prepared by COE.

He contends that his rights as a veteran have been violated as there were nonveterans who were placed in positions which were not affected in the RIF. In the 1980 decision, it is stated that the duties of the USPS architects doing FDS work were contracted-out to non-government consultants. Mr. Harold Clements, a former project manager on whose projects the appellant had worked, gave testimony to this effect. There is no other evidence to support this position and in the most recent hearing, there was testimony which contradicts it. Mr. Clements was a project manager. He did not occupy a position at an organizational level with Mr. Wiernicki, nor at COE, with Mr. Barnes. Further, as characterized by the court, Mr. Clements' testimony was halting as he could not readily recall what had happened in 1971, almost 9 years before the time of his 1980 testimony.

Having reviewed this testimony, I find that it is internally inconsistent. Mr. Clements also stated that "the postal design specification drawings, which Mr. Van Sant did, they never left the Postal Service." Tr. p. 73. Mr. Wiernicki testified that following the appellant's separation, the Systems Design Branch was combined with the Plant Engineering Branch to become the Engineering Systems Design Branch. He stated that the concern of that branch is not the postal buildings, but the systems in the buildings. He also testified that this branch was staffed with engineers, project managers, and engineering technicians. When testifying about the nature of his work, the appellant testified that both he and the systems branch had previously had to contribute to the FDS package.

Mr. Wiernicki and Mr. Linneman testified that the USPS wanted to shift from a

functional alignment to a product oriented configuration. In so doing, a more project management type of approach would be used and more engineers would manage the work. Mr. Clements was one such "project" engineer. The Systems Branch was already responsible for developing the systems drawings. Mr. Van Sant testified that when he received a Form 929, Description of Project, he would make a tentative site size determination, would receive information from Systems on Mail Handling Systems, Processing Systems, etc., and make a tentative size of building determination and then do hard line drawings for the building site and grounds. He also contributed to the narrative material in the total FDS package. Even before the RIF, however, this same work was also done by outside contractors. See Appellant's Supplemental Exhibit 24. Mr. Van Sant

also testified that he and Mr. J. Jessemy (a GS-12 level architect) were the only "project architects." Thus, while I do not find Mr. Clements' rememberance that the appellant's work was contracted out unreasonable in these circumstances, I find that it is incorrect.

I find that the preponderance of the testimony, including the appellant's, and the documentary evidence indicates that following the RIF, no one took over the "position" which the appellant had occupied. Rather the duties responsibilities which had been assigned to the appellant were absorbed into other positions in the new Engineering Systems Design Branch. Some duties were included in the project managers' position. Most of the drawing and drafting duties were assigned to various engineering technicians. Agencies generally have the authority to organize as they deem appropriate. E.g.

Bielec v. U.S., 456 F.2d 690 (Ct. Cl. 1972).

The appellant's being a veteran placed no obligation on USPS to organize the Mail Processing Group to include architect positions. As for the "architects" detailed from COE, the record now reflects that COE agreed to the details because the COE Postal Construction Support Office was still being organized. COE response to appellant's discovery request, part II. The details initially were to be for 30 days. Appellant's Supplemental Exhibit #1. These details were extended to August 21, 1971, and then further extended until COE could offer them permanent assignments. This latter determination was to be made on a case by case basis. The copies of the appropriate personnel records and hearing testimony reflect that Mr. Carnahan was the first to leave and that he did so in

September, 1971. At that time another COE architect (who had also formerly been with POD), was then detailed. Mr. Blanchard's detail ended with a reassignment on September 28, 1971. Messrs. Miller and Milaknis who were still at USPS when the appellant was RIF'ed were returned to COE on October 31 and October 26, 1971. The September detailee, Mr. Dickerson, completed his detail on December 7, 1971, when he was RIF'ed by COE. He was the last of the detailees to leave USPS and upon determination that he would be RIF'ed, he was entitled to 30 days' notice. I find it reasonable to assume that his detail was continued during the notice period rather than to return him to COE for the final 30 days. His detail otherwise could have then ended around the end of October. I find no evidence that there was a continuing architect position. A continuing position is

generally considered one that is established and will last for at least 90 days. See 5 C.F.R. § 351.603. In fact, the reorganization was effective October 6, 1971. That is the date on which Mr. Wiernicki's records reflect that he became Manager, Systems Engineering Branch. That is also the date from which the appellant and another employee were granted exceptions to accommodate a later separation date. I find no evidence the appellant's position continued and was performed by COE employees.

Finally, the appellant now contends that his release was improper and a violation of his rights under 5 C.F.R., part 351, because the agency did not include the COE detailees as "competing employees" in the RIF. As stated above, as employees of another agency, it would have been improper for USPS to include

the COE detailees in its RIF. The appellant's competitive area was a single administrative authority and proper within the meaning of 5 C.F.R. § 351.402. The detailees were not, as argued by the appellant, occupying established positions in USPS. Rather, they were carrying out duties given them by their project leaders. The appellant also argues in this regard that details of COE employees to the USPS were illegal and that, therefore, the RIF should not be allowed to stand. Based upon consideration of the facts set forth above, however, I find that the agency did redistribute the duties of the appellant's position and that it had left no architect position. Both the former Civil Service Commission and this Board are without authority to determine as

part of a RIF appeal whether an inter-agency detail has been accomplished with full compliance of all applicable laws and regulations. My observation of the civil service generally, reflects that inter-agency details occur on a regular basis. As regards this case, I find that a situation did exist in which USPS could properly invoke RIF procedures and that there was nothing which precluded the appellant from being affected in that RIF, nor that any of his rights were violated.

DECISION

The RIF action affecting the appellant is hereby AFFIRMED.

This decision a becomes final decision of the Merit Systems Protection Board unless the appellant files an appeal, in duplicate, with the Office of

the Secretary, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, within fifteen calendar days of receipt of this decision.

Martha J. Lanphear
Presiding Official

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1305

Victor Howard Van Sant,

Appellant,

v.

United States Postal Service, Corps of Engineers, Merit Systems Protection Board, The United States,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Argued: December 8, 1982
Decided: March 24, 1983

Before SPROUSE and ERVIN, Circuit Judges, and MICHAEL*, District Judge.

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*Honorable James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

Over eleven years ago Victor Howard Van Sant's job with the United States Postal Service was terminated. Fighting this discharge, Van Sant Pursued his administrative remedies unsuccessfully, and then filed an action in district court, which upheld the Civil Service Commission. This court, in an unpublished opinion handed down on September 7, 1979, reversed and remanded for "a complete evidentiary hearing" on Van Sant's claim. The Merit Systems Protection Board ("MSPB," the successor to the Commission) subsequently held a hearing. That hearing, however, was anything but complete. On the basis of the hearing, the MSPB upheld Van Sant's discharge. Van Sant appealed directly to this court, which held that direct review of MSPB decisions by the courts of appeals is not available in proceedings begun before

1979, the date of the Civil Service Reform Act. Van Sant thereupon filed an action in district court, which upheld the MSPB's decision. We now vacate that court's judgment and remand once again for further evidentiary proceedings.

I.

In early 1971, Van Sant was a "planning architect" in the Plant Engineering Branch of the Research and Development Department of the United States Post Office. The primary task of the four planning architects in the department was to develop "functional design specifications." Responsibility for detailed architectural and aesthetic design was exercised by "design architects" in the Post Office's Department of Facilities. As part of the Post Office's reorganization as the United States Postal Service (the "Service") under the 1970 Postal Reorganization Act, the Postmaster Gen-

eral entered into an agreement with the Army Corps of Engineers (the "Corps") in March 1971. On its face the agreement transferred to the Corps, among other tasks, the responsibility for the job previously performed by the Facilities Department's design architects. Pursuant to statutory provisions protecting the employment of civil servants whose jobs are transferred from one agency to another, the Post Office on June 27, 1971, transferred 136 persons, including the Facilities Department design architects, to the Corps.

On June 30, 1971, the Post Office was abolished and its employees, including Van Sant, became employees of the Service. Between June 28 and July 2, several of the design architects who had been transferred to the Corps were detailed to work in Van Sant's department. They apparently performed the same

planning duties Van Sant had been doing; indeed, Van Sant claims that they took over all his work, leaving him nothing to do. On July 28, the Research and Development Department was abolished and its planning architects transferred to the Mail Processing Department of the Service. A month later, Van Sant and his colleagues were informed that their positions were going to be abolished, and on October 5, 1/ Van Sant was separated from the Service. 2/

The Service apparently conceded at the MSPB hearing that the architects

1/ Or October 12; the MSPB findings are unclear. Van Sant stated at the MSPB hearing that his separation became final on October 12.

2/ One of Van Sant's fellow planning architects remained at the Service for almost six more weeks because, according to the Civil Service Commission's letter to Van Sant of March 14, 1972, it appeared, incorrectly as it turned out, that he would be placed in another agency.

detailed back to the Service by the Corps performed planning tasks for periods of time subsequent to Van Sant's separation from the Service in October. A 1972 Equal Employment Opportunity Commission affidavit by Van Sant's erstwhile superior John Wiernicki stated that as of January, 1972, the planning tasks were being performed by the Corps. 3/ The planning tasks eventually were contracted out to private architects.

Van Sant's interpretation of these events is that his planning duties continued to be performed by government employees--the former Post Office design architects who were transferred to the Corps and then detailed back to the Service--after his separation and that

3/ This affidavit directly contradicts the finding of the MSPB that the Corps architects were detailed to the Service for sixty to ninety days.

only at a later date did the Service contract out the planning function. The Service maintains that the design function was transferred to the Corps and the planning function retained; that the Service then decided to contract out the planning function and pursuant to that decision discharged Van Sant; and that the performance of planning duties by the Corps employees was only a temporary expedient.

II.

Van Sant's legal contention is that the government violated the 1944 Veterans' Preference Act, 5 U.S.C. § 3503 (a) (1977),4/ in discharging him. At the time this action was begun, section 3503(a) stated that

4/The subsequent rewording of § 3503, see Pub.L. 96-54, § 2(a)(18), 93 Stat. 382 (1979), is of no significance in this litigation.

> [w]hen a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

It is uncontested that Van Sant, a World War II veteran, was a "preference eligible" within the meaning of this provision, and as such was entitled to the protection afforded therein had his function been transferred from the Service to the Corps.

The disagreement between Van Sant and the Corps is factual: was the Post Office planning function for which Van Sant was employed transferred by the Service to the Corps as Van Sant maintains, or was it first retained by the Service and then abolished, as the Service insists? Van Sant, in addition, contends that his separation from the

Service by a "reduction in force," 5 C.F.R. §§ 351.201 et seq., was procedurally invalid. 5/

The Service was entitled to discharge Van Sant by the reduction in force mechanism if it did so pursuant to contracting out his job to private architects. See American Fed. of Govt. Employees v. Stetson, 640 F.2d 642 (5th Cir. 1981). The Service points to the established fact that all four planning architects were discharged in or around October, 1971, as supporting the MSPB's

5/ Van Sant's claim on this point depends on acceptance of his view of the function transfer issue: (1) the only reason given him for his discharge was "no other work available," (2) accepting his view that the Service transferred rather than abolished his job this was untrue; (3) therefore he was entitled to be transferred to the Corps, the Service having failed to cite a reason for his discharge. This is a neat syllogism but stands or falls on the correctness of its middle term, and is in fact a restatement in other words of his substantive claim.

conclusion that Van Sant's position genuinely was abolished. Van Sant points to the continued performance of planning duties by the Corps design architects after his discharge as proof that, in reality if not in name, the planning function was transferred to the Corps. He also points to various documents that, he contends, confirm that the planning duties were assumed by the Corps for a significant period of time. Although the MSPB accepted Van Sant's contention that the design architects transferred to the Corps performed planning duties while detailed back to the Service, it found as a fact that this was the temporary performance of duties other than those transferred to the Corps.

"The question of whether there has been an actual transfer of functions . . . is a question of fact." Nat'l Council of CSA Locals, AFGE v. Schweiker,

526 F.Supp. 861, 866 (D. D.C. 1981). This determination "cannot be based on a simple reading of the statute," and requires the MSPB to make a "careful review" of "the individual functions performed at [the old agency] and to be performed at [the new agency]." Id. at 864. Our opinion remanding this case to the MSPB for an evidentiary hearing directed the agency to determine the substantive nature of the jobs involved, not their labels: the MSPB was instructed to "focus upon the nature of Van Sant's job function with Research and Engineering in order to determine which department, if any, now performs that function."6/

6/ We note that federal regulations also view transfers of functions in pragmatic rather than formalistic terms. The regulations define a "function" as "all or a clearly identifiable segment of an agency's mission, regardless of how it is

In our view, the MSPB's review of Van Sant's complaint failed to undertake the "careful review" of job functions required to effectuate the Veterans' Preference Act and mandated by this court. The MSPB concluded that the planning function in which Van Sant was employed was abolished, not transferred. In reaching this conclusion, the MSPB compared Van Sant's job description with the description of the functions transferred to the Corps contained in the March 1971 interagency agreement. Noting that the latter document described the design but not the planning function, the MSPB "determined" that the latter was not transferred. This conclusion does not

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performed," 5 C.F.R. § 351.203(c), and state that a transfer of function occurs "regardless of whether or not the movement [of the function] is made under authority of a statute, Executive Order, reorganization plan, or other authority." 5 C.F.R. § 351.301.

follow. Van Sant's argument is that some of the design architects transferred under the agreement to the Corps were put to work doing his planning tasks and that therefore in reality the latter also were transferred. The mere fact that the agreement does not mention this second function transfer does not prove that it did not happen.

The MSPB dismissed the presence of Corps employees doing planning tasks at the Service as irrelevant because they were on a temporary detail, for sixty to ninety days, involving duties other than those performed as a function of the Corps. To do so, the MSPB had to erect the halting replies of one government witness into certainties. The witness, as an examination of the hearing transcript reveals, was quite uncertain about the purpose of the Corps' employees' presence, or the length of their stay.

The MSPB opinion asserts that Van Sant's discharge was pursuant to a prior decision to contract out his tasks, followed by implementation of that decision. However, the record before this court does not support that chronology. After reading the record, we remain uncertain when the Service decided to abolish the planning function jobs, when it in fact contracted out those jobs, or why it, as it admitted at the hearing, utilized Corps employees in those jobs for some unknown period after Van Sant's discharge instead of retaining Van Sant, a "preference eligible" under the Veterans' Preference Act.

Finally, the MSPB totally failed to determine which department, if any, was performing the planning function at any

relevant point of time, despite this court's specific instructions to do so.7/

We are loath to remand this case for yet another round of proceedings, but we perceive no other alternative. On the basis of the inadequacies in the record, and the discrepancies between the record and the MSPB's findings, we are compelled to conclude that the MSPB's decision was not supported by substantial evidence, 8/

7/ Van Sant raises a procedural issue concerning the conduct of the evidentiary hearing. Despite a request by the hearing officer, the Service and the Corps refused to produce witnesses for whom Van Sant had asked. In order to cure the unfairness created by this recalcitrance, the hearing officer stated that he would accept as true the contentions Van Sant hoped to establish by the witnesses. Van Sant complains that the MSPB did not do this liberally and fairly. A comparison of Van Sant's offer of proof with the MSPB's written opinion tends to confirm Van Sant's complaint.

8/ In cases coming before us from the MSPB, "[o]ur review is limited to determining whether the Board's proceedings, findings, and conclusions (1) were arbitrary, capricious or otherwise unlawful;

and therefore cannot stand. See Federal Power Commission v. Transcontinential Gas Pipe Line Corp., 423 U.S. 326 (1976) (court of appeals ordinarily must remand agency decision not sustainable on administrative record).

The problems we perceive in the present administrative record are not altogether the fault of the MSPB. 9/ Nevertheless, we stress that on remand it is the obligation of the MSPB to develop fully a record directly addressing the issues in dispute between Van Sant and the Service. These issues include, but

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and (2) adhered to required procedures; and (3) were supported by substantial evidence." Snipes v. U.S. Postal Service, 677 F.2d 375, 376 (4th Cir. 1982) (per curiam). See 5 U.S.C. § 7703(c) (1980).

9/ The uncooperative attitude of the Service and the Corps, and the sometimes inept character of Van Sant's pro se representation before the hearing officer no doubt contributed significantly to the confusion.

are not limited to, the actual nature of the work performed by the Corps architects detailed to the Service, the reasons for assigning that work to those persons rather than to Van Sant, the time period during which the Corps employees worked at the Service, the date of the Service decision to abolish the planning function, and the date of its actual abolition. On these, and any other relevant issues, the MSPB is to make the findings of fact necessary for a final resolution of this unduly prolonged litigation.

III.

We reverse the judgment of the district court upholding the MSPB's decision, and remand to the MSPB for further proceedings.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 81-0769-A
UNITED STATES POSTAL SERVICE, et al.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This matter came on to be heard again on Victor Van Sant's petition that he be reinstated with back pay to the United States Postal Service or the Corps of Engineers.

Van Sant was discharged from his job as an architect with the Post Office Department when that agency was reorganized into the United States Postal Service--the reorganization was begun in 1970 and Van Sant's position was terminated in 1971.

His complaint was first heard by the United States Civil Service Commission--that Commission found that Van Sant's job function with the Postal Service was not transferred to the Corps of Engineers.

Five years later, Van Sant filed a complaint in this Court, seeking a reversal of the Commission's findings.

This Court upheld the ruling of the Commission. That ruling was appealed and the Court of Appeals remanded the case to this Court with instructions to further remand to the Civil Service Commission for a complete evidentiary hearing on the issue of whether Van Sant's job function was transferred to the Corps of Engineers or to any other department - and whether, if so, Van Sant was entitled to a transfer to the receiving agency. The Court of Appeals further stated that such hearings focus on the nature of Van Sant's job function with Research &

Engineering in order to determine which department, if any, now performs that function.

That was done and the required evidentiary hearing was heard by the Merits System Protection Board (successor to the Civil Service Commission) on March 25, 1980.

The Board found from the evidence presented:

> . . . that the function for which Van Sant was employed by the U.S. Post Office Department was not transferred to the Army Corps of Engineers; that Corps employees were detailed to the U.S. Postal Service to perform Postal Service work and not Corps work; and that many of the duties previously performed by Van Sant were contracted to consultants in private enterprise which gave rise to abolishment of Van Sant's former position which in turn necessitated the separation of Van Sant by reduction-in-force action.

Its analysis and findings are attached hereto and made a part hereof.

The record before the Merits Board - which has been filed herein and made a

part of these proceedings - consisted of six volumes of exhibits, documents and records dating back to 1970, and a transcript of the March 25, 1980 hearing.

This Court has carefully examined this voluminous record and has considered the briefs and arguments of the parties supporting their respective positions, and is of the opinion that the decision of the Merits System Protection Board is supported by substantial evidence, and should be AFFIRMED, and

IT IS SO ORDERED.

Van Sant admitted he was not a design architect assigned to the Bureau of Facilities when that Bureau's functions were transferred to the Corps of Engineers. He worked for the Research & Engineering Department which was responsible for the development of functional design specifications for major Postal facilities.

He also concedes that none of the architects that were working for Research & Engineering were transferred to the Corps of Engineers when the Corps took over the Post Office Bureau of Facilities' functions.

Van Sant's contention that detailing five of the transferred Bureau of Facilities architects to assist the Post Office Mail Processing Group staff and its planning functions constituted a de facto transfer of the Post Office planning facilities to the Corps of Engineers, lacks both evidentiary and legal support for the reasons stated and the law cited by the Hearing Appeals Officer.

The administrative record clearly shows that this was only a temporary assignment (60-to-90 days) to assist the Post Office in completing the functional design specifications for the buildings

that the Corps of Engineers had contracted to build.

The administrative record further discloses that after reorganization, the U.S. Postal Service decided to abolish its planning department (Mail Processing Group - successor of Research & Engineering) and to contract out this work to non-government consultants. One month later, Van Sant and the other Mail Processing Group architects were advised their positions would be abolished on October 5, 1971.

Van Sant was then separated through regular reduction-in-force procedures.

Van Sant claims that he was denied procedural due process when the Hearing Appeals Officer refused to comply with his March 7, 1980 letter request to subpoena some of the Corps of Engineers' transferred employees that had been

detailed to do Post Office planning work, lacks merit.

It is neither necessary nor proper to call witnesses or produce documents to prove facts which were stipulated to by agency officers.

Van Sant's offers of proof through these witnesses were accepted as true by the Hearing Appeals Officer.

A Hearing Appeals Officer has the authority and duty to limit unnecessary and cumulative evidence.

Nothing further remaining to be done herein, this case stands DISMISSED at the costs of the plaintiff, and

IT IS SO ORDERED.

The Clerk will send copies of this Memorandum Opinion and Order to all counsel of record.

/s/ Oren R. Lewis
Senior United States District Judge

February 11, 1982
Attachment.

UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD WASHINGTON FIELD OFFICE

IN THE MATTER OF

VICTOR HOWARD VAN SANT	)	
	)	DECISION NO. DC035100006
v.	)	
	)	DATE JUNE 11 1980
U.S. POSTAL SERVICE	)	
	)	
	)	

INTRODUCTION

Pursuant to the June 21, 1979, order of the United States Court of Appeals for the Fourth Circuit, the district court for the Eastern District of Virginia, on September 7, 1979, remanded this case (Civil Action No. 77-756-A) to the Board with instructions to conduct a "complete evidentiary hearing on the issue of whether Van Sant's job function was transferred to the Army Corps of Engineers or to any other department and

whether, if so, Van Sant was entitled to a transfer to the receiving agency."

BACKGROUND

Mr. Van Sant was separated from his employment as an architect at the U.S. Postal Service through a reduction-in-force action in 1971. The reduction in force resulted from the reorganization of the Post Office Department into the U.S. Postal Service pursuant to the Postal Reorganization Act. Appellant appealed the separation to the Civil Service Commission alleging inter alia, that employees of the U.S. Army Corps of Engineers were completing functional design work to which he had been assigned prior to the reduction in force. He concluded, therefore, that the function in which he was primarily engaged had been transferred to the Corps and he should have been transferred with the function

pursuant to 5 U.S.C. 3503(a). The Civil Service Commission decided, on the basis of the agency's representations, that the apppellant's duties and responsibilities had not been transferred and, that the appellant was not entitled to a transfer to the Corps. The appellant exhausted all administrative appeal rights and the Commission upheld the agency's action separating appellant. Appellant appealed the Commission's decision in 1978. In the district court, the government moved for summary judgment which was granted. Appellant appealed to the Fourth Circuit which reversed and remanded the case for further proceedings.

ANALYSIS AND FINDINGS

Appellant was employed as an architect in the Plant Engineering Branch of the Research and Engineering Division, which was "responsible for the

development of functional design specifications for major postal facilities" including, "exploration and adaptation of the most economical building, mechanical, and mechanization systems that contribute materially to the U.S. Postal Service's ability to efficiently house the ever - expanding postal plants." (Appellants Hearing Exhibit (HE) V-4).

Appellant's duties included the following:

1. Analyzes schematic and preliminary plans, architectural plans and elevations, structural plans and building requirements, design criteria and construction details related to major projects for new construction, modernization and rehabilitation of postal facilities, to determine estimates of cost and use of Departmental building standards and material specifications. 10%

2. Prepares specifications for materials and standard construction details for building projects to be used by Regional Engineers, Contract Architects, bidders, lessors and other Government agencies.

3. Coordinates with representatives of other divisions and branches to insure inclusion of materials, mechanical and

electrical utility services and equipment in specifications and cost estimates. 5%

4. Reviews, for compliance with contractual requirements, and recommends appropriate action, of construction specifications, materials and cost estimates submitted by contract architects, bidders, lessors and the General Services Administration. 5%

5. Prepares building requirements and design criteria for postal facilities. 50%

6. Writes and/or revises as necessary, various Departmental manuals and publications relating to construction standards for Regional guidance. 5%

7. Renders expert assistance to the other branches of the Systems Engineering Design Division and to other divisions of the Bureau in all matters relevant to specification writing and cost analysis. 5%

8. Provides technical criteria for the development of professional contracts, reviews proposed contracts and evaluates the need for contract changes and recommends acceptance or rejection of contract changes. 5%

9. Maintains an update knowledge on latest improvements and development in the field of building materials and products. 5%

10. Provides technical guidance relating to materials, specifications and cost analysis for all special programs and projects authorized by the Department. 5%

Ibid.

The record reflects that in March 1971, the Postmaster General entered into an agreement with the Army Corps of Engineers to take over the on-going and future large scale facilities construction program. The Corps of Engineers was to be involved in all phases of the facility construction program, including engineering design, selection of private enterprise architect-engineering firms, real estate services, awarding construction contracts, and supervising construction and final acceptance of postal facilities. (Appellant's HE B-4.)

On June 27, 1971, 136 persons, including approximately five architects employed in the real estate acquisition,

engineering and construction functions at the former Post Office Department transferred to the Corps of Engineers Postal Construction Support Office headquartered in Washington, D.C. (HE B-6, B-7.)

Appellant testified that on July 2, 1971, the Acting Chief, Plant Engineering Branch, reassigned certain projects to 18 people including appellant. Some of those employees assigned to projects had recently transferred to the Corps. Appellant contends that thereafter and until his separation on October 12, 1971, those Corps employees were working on design specifications for projects to which he had been assigned. Appellant had requested the appearance of several Corps employees to verify their presence at the Postal Service and to corroborate his testimony that they were engaged in a review of the functional design specifications. The Corps was unwilling to make

those employees available. Since the facts of which they would testify were stipulated to by agency officials, we found it unnecessary to press the matter. Appellant's offers of proof with respect to those persons are accepted as true.

The agency contends that those employees were detailed by the Corps for a period between 60 to 90 days to assist in expediting the planning phase preliminary to the construction phase.

A transfer of function is defined as "the transfer of the performance of a continuing function from one competitive area to one or more other competitive areas, or the movement of the competitive area in which the function is performed to another commuting area." 5 C.F.R. 351.203(i). Sweeny v. United States, 177 Ct. Cl. 651 (1966).

A function means "all or a clearly identifiable segment of an agency's

mission, regardless of how it is performed." Federal Personnel Manual, Ch. 351, subch. 3, Section 3-1. A function is transferred when it disappears or is discontinued at one location and appears in identifiable form at another location. ibid.

As stated above, the function of the Plant Engineering Branch in which appellant had been employed prior to the reorganization, was to develop functional design specifications for major postal facilities. (HE V-4.) Appellant's position description indicates that 50% of appellant's duties were to prepare building requirements and design criteria for postal facilities. ibid.

In the manual, Operating Procedure for the Development of Functional Design Specifications, published by the Postal Service in April 1971, functional design specifications are identified as:

> "the means by which Postal Service requirements for major facilities are established and delineated for the direction of the Facilities Department, The Corps of Engineers, the Architect-Engineer and any other Engineering consulting organizations. These specifications identify systems design, space and mechanization requirements, define items peculiar to postal operations and establish criteria and guidelines for implementation of the project." (HE V-6, manual at page 1).

Functional design specifications are prepared to provide a basis for developing working specifications, manpower requirements, and capital and operating cost estimates. "It is not the intention of the Functional Design Specification to identify detailed architectural design or esthetic considerations." (Id at p. 2).

The "Memorandum of Agreement between the Post Office Department and the Corps of Engineers, Department of the Army providing for Postal Facilities Acquisition Services" executed on March 11, 1971,

sets forth the role that each agency will assume in the acquisition and construction of postal facilities. It provides in pertinent part that:

> ". . . the USPOD (United States Post Office Department) will provide the Corps with applicable project design standards, specific design criteria, general functional requirements, mechanization requirements, and any descriptive material or sketches needed to define the general quality of construction, space allocation, functional layout, and operating characteristics to be incorporated into the design of the project." (HE V-10, Agreement, pp. 8-9).

We find, on the basis of the documents submitted by the appellant, particularly the position description for appellant's former position and the "Memorandum of Agreement," that the function in which appellant was engaged, i.e., the development of functional design specifications, was not transferred to the Army Corps of Engineers, but was retained by the USPOD.

Where there is a bona fide transfer of functions within the meaning of sec-

tion 3503 of Title 5, U.S. Code and applicable regulations, only employees who are actually identified with the function may be transferred. Barnes v. United States, 170 Ct. Cl. 639 (1965). Since the function in which appellant was engaged was not a function assumed by the Army Corps of Engineers, the agency's refusal to identify appellant for transfer was proper and appellant, therefore, had no entitlement to transfer to the Corps.

The fact that employees identified for transfer to the Corps returned to the Post Office and performed duties similar to those performed by the appellant does not, in and of itself, prove that appellant's function was transferred to the Corps. Mr. Harold Clements, a structural engineer and project manager in 1971, testified that the Corps employees were detailed to the USPOD for a period of 60-

90 days. (Transcript p. 56). On June 8, 1971, employees who were identified for transfer to the Corps of Engineers were provided a memorandum wherein general information relative to their transfer was given. Paragraph number five of that memorandum states:

> During the period between 27 June and the time your assignment rights have been determined, or you have otherwise been permanently assigned, it may be necessary to detail you temporarily to other duties at your same or a different location, on either USPOD facilities work or other available assignments. (HE B-6)

We find that Army Corps of Engineer employees were detailed to the USPOD and that Corps employees did perform duties relative to development of functional design specifications as required in appellant's position description. A detail is a "temporary assignment of an employee to position, <u>different</u> from that in which he is regularly assigned, for a specified period, with the employee re-

turning to his regular duties at the end of the detail." (emphasis supplied). Federal Personnel Manual ch. 300, subch. 8, Section 8-1. If a person performs work as a result of a detail, he is performing work other than that normally required of him. Thus, the presence of Corps employees on a detail does not require the inference that the duties and responsibilities performed by them are part of the Corps' function.

On June 30, 1971, the Department of the Post Office was abolished and on July 1, 1971, the U.S. Postal Service was established. As part of the transition, the Postal Service conducted a major reorganization. In the course of the reorganization the Research and Engineering Department was abolished as an organizational unit and its employees were transferred to new organizations. Appellant as well as other architects

within the Research and Engineering Departments were transferred to the Mail Processing Group on July 28, 1971. One month later appellant was notified that his position would be abolished and on October 5, 1971 appellant and other architects from the Mail Processing Group were separated through reduction in force procedures. Mr. Clements testified that following the departure of the architects, their duties were contracted-out to non-government consultants. (Transcript p. 77).

In summary, we find from the preponderance of evidence that the function for which appellant was employed by the USPOD was not transferred to the Army Corps of Engineers; that Corps employees were detailed to the U.S. Postal Service to perform Postal Service work and not Corps work; and that many of the duties previously performed by the appellant were

contracted to consultants in private enterprise which gave rise to abolishment of appellant's former position, which in turn, necessitated the separation of appellant by reduction-in-force action.

DECISION

In view of the above analysis and findings, the refusal by the U.S. Postal Service to identify appellant with the functions transferred to the Army Corps of Engineers is hereby affirmed.

For the Board:

Michael W. Doheny
Assistant Appeals Officer

Samuel J. Flanagan
Chief Appeals Officer

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1583

Victor Howard Van Sant,

Appellant,

versus

The United States; Postmaster General, U.S. Postal Service; Chief of Engineers; Corps of Engineers, Commissioner, Civil Service Commission.

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge

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Submitted June 21, 1979
Decided September 7, 1979

Before HAYNSWORTH, Chief Judge, WINTER and BUTZNER, Circuit Judges

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PER CURIAM:

Victor Van Sant was discharged from his job as an architect with the Post Office Department when that agency was

reorganized into the United States Postal Service. The reorganization was begun in 1970 pursuant to the Postal Reorganization Act and Van Sant's position was terminated in 1971. He contends that his job function was transferred from the newly formed Postal Service to the Corps of Engineers and that he was statutorily entitled to have the option of accepting employment with the Corps of Engineers prior to being discharged completely from government service. He seeks back pay and reinstatement.[1]

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1. The government argues that although Van Sant filed this suit within the applicable statute of limitations, see 28 U.S.C. § 2401(a) (six years), his cause should be barred by the equitable doctrine of laches. The government notes that Van Sant waited five years from the date his right of action accrued before he filed suit in district court. "Laches is sustainable only on proof of both of two elements: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." Mogavero v.

The legal basis for Van Sant's contention is 5 U.S.C. § 3503 which provides:

> When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

The Postal Service does not deny that Van Sant was "preference eligible" at the time of his discharge; however, it does deny that Van Sant's job function was transferred to the Corps of Engineers. The Service contends that Van Sant's discharge was necessitated solely by a

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McLucas, 543 F.2d 1081 (4th Cir. 1976). It is questionable whether the government has satisfied either of these two requirements. In any event, not one scintilla of evidence has been introduced to show prejudice. The government's contention is, therefore, without merit and the doctrine of laches will not be applied.

reduction in the work load requirements of Van Sant's department--the Mail Processing Group. Van Sant had been assigned to the Mail Processing Group after his original department, Research and Engineering, had been abolished during the reorganization. Mail Processing Group was a spin off of the latter department. The Service further avers that no functions of the Mail Processing Group were transferred to the Corps of Engineers.[2] The government does acknowledge that 136 employees of the Postal Service were given the opportunity to transfer to the Corps of Engineers;

2. A very confusing aspect of this case revolves around Van Sant's assignment to the Mail Processing Group. On the one hand, we are told that Van Sant's job function, i.e., architectural, fit within the functions assigned to the Mail Processing Group. On the other hand, the

however, those employees were working in the Service's Department of Facilities, the functions of which had in fact been absorbed by the Corps of Engineers.

Plaintiff disputes the contention that his job function was not transferred to the Corps of Engineers. He alleges that several months prior to his final discharge five employees from the Corps of Engineers substantially took over all of the work that had previously been assigned to him. The Service does not deny this contention, but attempts to explain the takeover in that the five employees from the Corps of Engineers "were completing functional design work

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Service justifies Van Sant's discharge from the Mail Processing Group in that the Group did not require the services of any architects. Moreover, it remains unanswered as to whether anyone in government service has continued to perform those same functions which had been assigned to Van Sant.

on projects which were to be taken over by the Corps." Oddly, this justification seems to imply that Van Sant's job function as an architect had indeed been transferred to the Corps of Engineers.

The plaintiff has fully exhausted the Civil Service Commission appeals process and the Commission has upheld Van Sant's discharge. Specifically, the Commission found that Van Sant's job function with the Postal Service was not transferred to the Corps of Engineers. The sole basis for this conclusion is the quoted cryptic explanation proffered by the Postal Service and the Service's general contention that no functions of the Mail Processing Group were transferred to the Corps of Engineers.

In 1978, five years after the issuance of the Commission's ruling, Van Sant lodged a complaint in district court seeking reversal of the Commission's

findings. The district court upheld the ruling of the Commission, stating, "There being no basis in the record for disturbing the Commission's findings its decision must be affirmed." Van Sant v. United States of America, C/A No. 77-756 (E.D.V. April 27, 1978). Summary judgment was granted in favor of the government.

The findings of the Commission or of any agency appeals process will be affirmed unless it be shown that those findings are "arbitrary, unreasonable, capricious, or not supported by substantial evidence." Halsey v. Nitze, 390 F.2d 142, 144 (4th Cir.), cert. denied, 392 U.S. 939 (1968); see also Phillips v. Bergland, 586 F.2d 1007, 1012 (4th Cir. 1978). A thorough review of the certified record of this case submitted by the United States Civil Service Commission reveals very little

evidence at all. The bulk of the record consists of correspondence of no evidentiary value and the written findings of the Commission are generally conclusory. Particularly disturbing is the Commission's failure to fully and fairly investigate the transfer of function issue. Apparently the Postal Service's mere denial of plaintiff's allegation was deemed an appropriate basis for the Commission's adverse ruling. This is error. Something more than bald reliance upon the assertions of the Postal Service is required.

In short, nothing in the record supplied by the Civil Service Commission lends any credence to the ultimate conclusion reached by that body. Since nothing in the record would justify a conclusion that the Commission had based its finding upon substantial evidence, we remand this case to the district court

with instructions to further remand to the Civil Service Commission for a complete evidentiary hearing on the issue of whether Van Sant's job function was transferred to the Corps of engineers or to any other department, and whether, if so, Van Sant was entitled to a transfer to the receiving agency. Such a hearing should focus upon the nature of Van Sant's job function with Research and Engineering in order to determine which department, if any, now performs that function.

Accompanying this appeal are a number of collateral motions submitted by plaintiff. In light of the disposition of this appeal, we find it unnecessary to address the merits of those motions and, accordingly, those motions are denied.

REVERSED AND REMANDED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

VICTOR HOWARD VAN SANT,	)	
PLAINTIFF,	)	CIVIL ACTION NO. 77-756-A
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
DEFENDANTS.	)	

ORDER

The plaintiff brought this action seeking back-pay and reinstatement to government employment from which he was allegedly illegally terminated. The case is currently before the Court on the defendant's motion for summary judgment.

The complaint alleges that the plaintiff's job and function with the United States Postal Service were transferred to the Corps of Engineers on June 28, 1971. It further alleges that a reduction-in-

force notice was issued by the Postal Service on August 27, 1971 and that the plaintiff was terminated from government employment on November 12, 1971. The plaintiff contends that he was entitled to be transferred to the Corps of Engineers pursuant to 5 U.S.C. § 3503 (1970) and that the reduction-in-force notice constituted an "adverse action" within the meaning of 5 U.S.C. § 7512 which entitled him to thirty days' written notice.

The record of Mr. Van Sant's appeal of his dismissal to the Civil Service Commission discloses that Mr. Van Sant was employed as an architect in the Postal Service's Research and Engineering Department prior to July 28, 1971. The record further discloses that the Research and Engineering Department was abolished pursuant to the Postal Reorganization Act of August 12, 1970 and

that the plaintiff was transferred to the Mail Processing Department on July 28, 1971. The record finally indicates that the Mail Processing Department was the subject of a reduction-in-force which resulted in the termination of Mr. Van Sant's employment.

The plaintiff's contention that his function was transferred to the Corps of Engineers was advanced at length before the Civil Service Commission. The Commission found that the architectural functions which were transferred to the Corps were those of the Department of Facilities and concluded that, since neither Mr. Van Sant's function with the Research and Engineering Department nor his function with the Mail Processing Department was transferred, the plaintiff was not entitled to be transferred to the Corps. There being no basis in the record for disturbing the Commission's

findings, its decision must be affirmed. See Wagner v. Higley, 235 F.2d 518 (D.C. Cir. 1956), cert. denied 352 U.S. 936 (1956).

The plaintiff's contention that he was entitled to thirty days'written notice of the decision to issue a reduction-in-force notice also lacks merit. Termination from employment by reason of a reduction in force does not constitute an "adverse action" within the meaning of 5 U.S.C. § 7512 (1970). Fass v. Gray, 197 F.2d 587 (D.C. Cir. 1952), cert. denied, 344 U.S. § 839 (1952).

Accordingly, summary judgment is hereby granted to the defendants.

The Clerk is directed to send copies of this Order to the plaintiff and counsel for the defendants.

April 27, 1978

/s/ Oren R. Lewis
United States Senior District Judge

UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D.C. 20415

D E C I S I O N

IN THE MATTER OF	)	
	)	TYPE CASE:
	)	Reduction In
Victor H. Van Sant	)	Force
	)	

INTRODUCTION

Mr. Victor H. Van Sant appealed from a decision of the Commission's Appeals Examining Office which found that the action of the U.S. Postal Service, Washington, D.C., separating Mr. Van Sant by reduction in force, effective October 12, 1971, complied with the Civil Service Regulations.

STATEMENT OF THE CASE

By notice dated August 27, 1971, Mr. Van Sant was informed that his position had been abolished and that it was

proposed to separate him through reduction-in-force procedures from his position as Architect, PS-15, effective October 5, 1971. The effective date of the action was later extended and the appellant was separated October 12, 1971.

The appellant filed an appeal with the Commission's Appeals Examining Office by letter dated October 27, 1971.

FIRST LEVEL DECISION

In a decision issued March 14, 1972, the Appeals Examining Office (AEO) found that the appellant was properly listed on the retention register, that he was within reach for reduction-in-force action, and that he received proper notice to that effect.

The AEO further found that the appellant's position was not identified with a transfer of function to the Corps of Engineers and that, therefore, he had no

rights accruing from that transfer; that there was no position for which he qualified and to which he had mandatory assignment rights; and that his competitive level was properly established and not excessively narrow.

REPRESENTATIONS TO THE BOARD OF APPEALS AND REVIEW

In extensive representations, the appellant repeated the issues previously raised.

ANALYSIS AND FINDINGS

The appellant contends that he possesses the drafting skill necessary to qualify for an Industrial Engineering Technician position and that he should have been offered assignment to such a position occupied by an employee in a lesser retention subgroup. In order to be qualified for a position by assignment

in a reduction in force, an employee must meet the basic qualification requirements and, in addition, have the special skills and abilities required to perform the duties of the position. The Board finds that the appellant's total background does not demonstrate a knowledge of industrial engineering and industrial management techniques, nor a specialized knowledge of and experience with mechanized mail handling systems such as would be necessary to assume the duties of the positions claimed without undue interruption of the work program.

After careful consideration of the entire record in this case, the Board finds that the AEO considered all the relevant issues raised on appeal and correctly decided those issues. The Board concurs in the findings and conclusions on those issues and need not restate them.

DECISION

The Board of Appeals and Review hereby affirms the decision of the Commission's Appeals Examining Office issued March 14, 1972.

Civil Service Regulations provide that the decision of the Board is final and there is no further right of administrative appeal.

For the Commissioners:

William P. Berzak
Chairman

August 29, 1972

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

Mr. Victor H. Van Sant
5708 5th Street, South
Arlington, Virginia 22204

March 14, 1972

Dear Mr. Van Sant:

Reference is made to your appeal of October 27, 1971 regarding the reduction-in-force action proposed by the Mail Processing Department, U.S. Postal Service, Washington, D.C., in its notice to you dated August 27, 1971 and effected on October 12, 1971 whereby you were separated from the position of Architect, PS-808-15, Step 3, $19,146 per annum.

We have reviewed the procedures used by your agency in conducting the reduction in force and have examined the retention register. Our review did not disclose any irregularity under the terms

of the Commission's reduction-in-force regulations.

The records show that, on the basis of your official assignment, you were properly listed on the retention register, were within reach for reduction-in-force action in your competitive level, and received advance written notice to this effect as required by the reduction-in-force regulations.

In its August 27, 1971 notice to you the agency stated that the Postal Reorganization Act of August 12, 1970 directed the reorganization of the Post Office Departament and you had been reached for release from your competitive level.

Regarding this matter, your attention is invited to the Federal Personnel Manual, Chapter 351, Subchapter 1, Section 2, which states in pertinent part:

"Reduction in force may be necessary because of conditions inside or outside the agency. Agency management may reduce certain phases of its work as the workload changes.

Reduction in force may require the separation of all employees in part of an agency or may require separation of some and shifting about of others.

Planning the work program and organizing the work force to accomplish agency objectives within available resources are management responsibilities. Only the agency can decide what positions are required, where they are to be located and where they are to be filled, abolished, or vacated. The agency determines when there is a surplus of employees at a particular location in a particular kind of work. A surplus of employees in any part of an agency requires the agency to determine whether the employees will be assigned to vacant positions, be adversely affected for reasons related to performance or conduct or compete in reduction in force."

These are management responsibilities and the management determinations regarding these responsibilities are not subject to review by the Civil Service Commission in a reduction-in-force appeal.

In your reduction-in-force appeal and in subsequent submissions to this office on December 22, 1971 and January 3, 17, and 19, 1972, you present a number of contentions which are discussed individually below:

You contend that the U.S. Postal Service failed to honor Civil Service Commission rules and regulations concerning job retention. You stated that an employee who had the same title, function, and performance as you under the same reduction-in-force action remained in the agency's employ for approximately six weeks beyond the scheduled October 5, 1971 separation date.

The agency advised that it conducted a vigorous outplacement program incident to the reduction in force and when it appeared that the other employee, Mr. John F. Jessamy, Jr., Architect, PS-808-12, would be placed in another agency, he

was given an extension to avoid a break in service. The agency stated that you too were also retained beyond the scheduled separation date.

Review of the documents in this instance revealed that while Mr. Jessamy was in the same competitive area as you and in a lower subgroup than you, he was in another competitive level. Therefore, you did not compete with him for release from your level. We note that Mr. Jessamy's position was abolished (as were all Architect positions in the competitive area) and he was separated effective November 19, 1971.

Since your right to compete for retention in your competitive area, Mail Processing Department, and level, PS-808-15 Architect, was not affected by the extension granted Mr. Jessamy, this contention is dismissed.

You question the endorsement "No other work available" that appears in Item 30 of your Standard Form 50 because you contend that five Architects were detailed from another agency and assigned work that you had been doing.

The agency stated that after the reorganization the complement established for your competitive area did not include any Architect positions and the Architects referred to by you were employees of the Corps of Engineers. These employees were completing functional design work on projects which were to be taken over by the Corps in accordance with the agreement entered into by the Postmaster General and the Corps of Engineers, Department of the Army, on March 11, 1971.

You contend that the U.S. Postal Service failed to honor your job transfer rights in that you were not permitted to

follow your function to the Corps of Engineers.

Federal Personnel Manual, Chapter 351, Subchapter 3, Section 3-1a, states in pertinent part:

> A function is all or a clearly identifiable segment of an agency's mission (including all the integral parts of that mission), regardless of how it is performed. For this purpose, an agency is any organizational entity; it may be an entire department, an independent establishment, a bureau, branch, division, section, or smaller unit.

Prior to July 28, 1971 you were assigned to the Research and Engineering Department which was abolished and employees of that Department were transferred with their functions to the newly established Research and Mail Processing Departments. You were transferred to the Mail Processing Department which became your competitive area for purposes of the reduction-in-force action.

The records show that the operational functions of the former Department of Facilities were transferred to the Corps of Engineers and employees in these functions were given the opportunity to transfer with their functions. As stated above, you were assigned to the Research and Engineering Department at the time the operational functions of the former Department of Facilities were transferred. The agency has certified to this office that no functions of the Research and Engineering Department were transferred to the Corps. Therefore, you had no transfer rights to the Corps of Engineers. This contention is dismissed.

You question the reason you were not placed in the same competitive level as Mr. George Bergdolt.

Federal Personnel Manual, Chapter 351, Subchapter 4, Section 4-3a, states in essence that competitive levels for

each competitive area are groupings of jobs so similar in all respects that the agency can readily move an employee from one to another without significant training and without unduly interrupting the work program.

We have examined the retention register on which Mr. George Bergdolt's name appears. We note that he is listed as Mechanical Engineer, PS-830-15, while you occupied the position of Architect, PS-808-15. Clearly, the two jobs are not interchangeable. We find that the PS-830-15 Mechanical Engineer and PS-808-15 Architect positions were correctly placed in separate competitive levels. Therefore, no consideration can be given to this contention.

You contend that the U.S. Postal Service failed to make you a reasonable offer of assignment to positions held by Mrs. Eleanor M. Simmons and Messrs. John

J. and Louis W. Ruff. Mrs. Simmons' position is Industrial Engineering Technician, PS-895-12, and Messrs. Ruff hold PS-895-14 Industrial Engineering Technician positions.

Federal Personnel Manual, Chapter 351, Subchapter 7, Section 1b concerning assignment rights states in pertinent part:

> The right of a released group I or II employee to assignment to a position in another competitive level depends on (1) the existence of a position held by a lower-standing employee he can displace and (2) his qualifications for the position.

Section 6b of the above cited regulation provides in pertinent part:

> When an employee released from his competitive level has retention standing enough to displace another employee, the agency must determine whether he is qualified in the sense of this section.
>
> In this determination, the agency must review carefully the employee's education, training, and experience. When the agency finds him qualified in these respects, that is, in terms of the Commission's standards and

> requirements, it must review even more carefully to determine if he has any special skills and knowledges the position requires, as well as any less tangible attributes, such as adaptability and ability to meet and deal with others when these are required by the job. To be considered qualified, and thus entitled to be placed, the employee should not need a significant amount of training in the actual duties of the position, although some instruction may be necessary to familiarize him with the organizational structure and with the office policies and routines he will have to apply. In other works, he ought to be as well-qualified for the position as if he had already performed successfully in a similar position, because he must be able to keep the work moving without serious interruption.

Since Mrs. Eleanor M. Simmons' subgroup status is I-A, we find that you could not displace her.

With regard to the PS-895-14 Industrial Engineering Technician positions occupied by Messrs. John J. and Louis W. Ruff, we find that your education, training, and experience show your qualifications to be preponderantly in the area of Architecture. It appears that

your main emphasis has been planning and designing structures whereas the Industrial Engineering Technician position as utilized by the U.S. Postal Service requires the design and evaluation of mail-flow systems within postal structures.

Based upon the foregoing, we find that you were not "fully qualified" within the context of the Commission's reduction-in-force regulations so as to have a mandatory right of assignment to the Industrial Engineering Technician position.

Therefore, this contention is dismissed.

We have considered but do not find your remaining allegations germane to the issue in a reduction in force.

In view of the above findings we must conclude that there was no violation of your rights under the Commission's reduc-

tion-in-force regulations. Therefore we cannot sustain your appeal.

This decision becomes a final decision of the Civil Service Commission unless the appellant files an appeal, in duplicate, with the Board of Appeals and Review, U.S. Civil Service Commission, Washington, D.C. 20415, within fifteen (15) calendar days of receipt of this decision.

Sincerely yours,

Herman D. Staiman, Chief
Appeals Examining Office

cc: Mr. Larry C. Gayle
Assistant Postmaster General
Employee Relations Department
1200 Penna. Ave., N.W., Room 3134
Washington, D.C. 20260

JUDGMENT
United States Court of Appeals
for the
Fourth Circuit

No. 84-2387

Victor Van Sant,

Appellant,

v.

United States Postal Services;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, AFFIRMED.

John M. Greacen
CLERK

Filed
August 29, 1985

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2387

Victor Van Sant,

Appellant,

versus

United States Postal Services;
U.S. Army Corps of Engineers and
Merit System Protection Baord,

Appellees.

No. 85-1007

Victor Van Sant

Appellee,

versus

United States Postal Services;
U.S. Army Corps of Engineers and
Merit System Protection Board,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of the appellant's motion for leave to file the petition for rehearing and suggestion for rehearing in banc out of time,

IT IS ORDERED that the motion is granted.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter, with the concurrence of Judge Widener and Judge Wilkinson.

For the Court,

JOHN M. GREACEN
CLerk

Filed
September 27, 1985

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2387

Victor Van Sant,

Appellant,

versus

United States Postal Services, et al,

Appellees.

No. 85-1007

Victor Van Sant

Appellee,

versus

United States Postal Services, et al,

Appellants.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of the appellant's motion for publication of the decision in these appeals,

IT IS ORDERED that the motion is denied.

Entered at the direction of Chief

Judge Winter with the concurrence of Judge Widener and Judge Wilkinson.

For the Court,

JOHN M. GRAECEN
Clerk

Filed
October 10, 1985

STATUTES

5 U.S.C. §3313. Competitive service; registers of eligibles

* * *

The names of preference eligibles shall be entered ahead of others having the same rating. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 420.

5 U.S.C. §3315. Registers; preference eligibles furloughed or separated

(a) A preference eligible who has been separated or furloughed without delinquency or misconduct, on request, is entitled to have his name placed on appropriate registers and employment lists for every position for which his qualifications have been established, in the order named by section 3313 of this title... Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 420.

5 U.S.C. §3502. Order of retention

[as in force in 1971]

(a) The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to --

(1) tenure of employment;

(2) military preference ...

(3) length of service; and

(4) efficiency or performance ratings.

* * *

(b) A preference eligible employee whose efficiency or performance rating is "good" or "satisfctory" or better than "good" or "satisfactory" is entitled to be retained in preference to other competing employees... Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 428; Pub.L. 90-367, §3, June 29, 1968, 82 Stat. 278; Pub.L. 90-623, §1(23), Oct. 22, 1968, 82 Stat. 1313.

5 U.S.C. §3503. **Transfer of functions** [as in force in 1971]

(a) When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each preference eligible employed in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 429.

5 U.S.C. §5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means --

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) The government of the District of Columbia.

(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee --

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action is in effect --

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during

the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period;...

(B) for all purposes, is deemed to have performed service for the agency during that period ...

* * *

(c) The Office of Personnel Management shall prescribe regulations to carry out this seciton. However, the regulations are not applicable to the Tennessee Valley Authority and its employees.

Added Pub.L. 90-83, §1(34)(C), Sept. 11, 1967, 81 Stat. 203, and amended Pub.L. 94-172, §1(a), Dec. 23, 1975, 89 Stat. 1025; Pub.L. 95-454, Title VII, §702, Oct. 13, 1978, 92 Stat. 1216; Pub.L. 96-54, §2(a)(14), Aug. 14, 1979, 93 Stat. 382; Pub.L. 96-465, Title II, §2306, Oct. 17, 1980, 94 Stat. 2165.

5 U.S.C. §7106. Management rights

(a) ... nothing in this chapter shall affect the authority of any management official of any agency -- ...

(2) in accordance with applicable laws --

(A) to hire, assign, direct, layoff, and retain employees in the agency...

Added Pub. L. 95-454, Title VII, §701, Oct. 13, 1978, 92 Stat. 1198.

39 U.S.C. § 1001. Appointment and status

(b) Officers and employees of the Postal Service ... shall be in the postal career service, which shall be a part of the civil service ... The Postal Service shall establish procedures, in accordance with this title, to assure its officers and employees meaningful opportunities for promotion and career development ...

(e) The Postal Service shall have the right, consistent with ...applicable laws, regulations, and collective-bargaining agreements -- ...

(2) to hire, promote, transfer, assign, and retain officers and employees in positions within the Postal Service ...

(3) to relieve officers and employees from duties because of lack of work or for other legitimate reasons; ... Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 728.

39 U.S.C. §1005. Applicability of laws relating to Federal employees

(a)(2) The provisions of title 5 relating to a preference eligible (as that term is defined under section 2108(3) of such title) shall apply to an applicant for appointment and any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title. The provisions of this paragraph shall not be modified by any program developed under section 1004

[supervisory and other managerial organizations] of this title or any collective-bargaining agreement entered into under chapter 12 of this title. Pub.L. 91-375, Aug. 12, 1970, 84 Stat. 731; Pub.L. 93-349, §2, July 12, 1974, 88 Stat. 354.

REGULATIONS

5 C.F.R. 330 Subpart B - Appointment from Reemployment Priority List

§330.201 Priority in Filling vacancies.

(a) When a qualified person is available on the agency's reemployment priority list, the agency may not fill a competitive position by:

(1) A new appointment, unless the person appointed is a qualified 10-point preference eligible;

(2) Transfer; or,

(3) Reemployment of a person not on the reemployment priority list unless the person is a preference eligible or is restored under Part 353 of this chapter.

* * *

(c) In selection from a reemployment priority list, an agency shall give preference to tenure group I employees over tenure group II employees, and to qualified preference eligibles over nonpreference eligibles within each tenure group. (5 U.S.C. 3315) [33 FR 12425, Sept. 4, 1968, as amended at 40 FR 23836, June 3, 1975; 43 FR 2378, Jan. 17, 1978; 43 FR 6205, Feb. 14, 1978; 45 FR 85653, Dec. 30, 1980]

5 C.F.R. Part 351-REDUCTION IN FORCE
[Regulations of the Civil Service Commission, effective in 1971]

Subpart B - General Provisions
[as pertinent]

§351.201 Use of regulations.

(a) Each agency shall follow this part when it releases a competing employee from his competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.

* * *

§351.203 Definitions.

In this part:

(a) "Competing employee" means an employee in tenure group I, II or III.

* * *

(c) "Function" means all or a clearly identifiable segment of an agency's mission (including all integral parts of that mission), regardless of how it is performed.

* * *

(i) "Transfer of function" means the transfer of the performance of a con-

tinuing function from one competitive area and its addition to one or more other competitive areas, or the movement of the competitive area in which the function is performed to another commuting area.

Subpart C - Transfer of Function

§351.301 Transfer of employees.

Before a reduction in force is made in connection with the transfer of any or all of the functions of an agency to another continuing agency, each competing employee in a position identified with the function or functions shall be transferred to the continuing agency without change in the tenure of his employment....

Subpart D - Scope of Competition

§351.401 Determining retention standing.

Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§351.402 Competitive area.

(a) Each agency shall establish competitive areas in which employees compete for retention under this part.

(b) The standard for a competitive area is that it include all or that part of an agency in which employees are assigned under a single administrative authority. A competitive area in the departmental service meets this standard

when it covers a primary subdivision of an agency in the local commuting area.....

* * *

§351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of this appointment or unduly interrupting the work program....

* * *

§351.404 Retention register.

(a) Each agency shall establish a separate retention register from the current retention records of employees in, and emloyees temporarily promoted from, each competitive level affected when a competing employee is to be released from a competitive level under this part.

* * *

(c) The agency shall enter on a list apart from the retention register the name and expiration date of the appointment or promotion of each employee serving in a position in the competitive level under specifically limited temporary appointment or temporary promotion followed by the name of each employee serving in a position in the competitive level with a per-

formance rating of less than "Satisfactory".

Subpart E - Retention Standing

§351.501 Tenure groups and subgroups - competitive service.

(a) Each agency shall clarify the competing employees on a retention register who occupy positions in the competitive service in the following groups and subgroups on the basis of tenure of employment and veteran preference. The descending order of retention standing:

(1) By groups is group I, group II, group III;

(2) Within each group is subgroup A, subgroup B; and

(3) Within each subgroup begins with the earliest service date.

(b) Group I includes each career employee who is not serving a probationary period. A career employee in an obligated position is in group I only when competiton for positions at and below the grade in which he last served on a permanent basis.

(c) Group II includes each employee serving a probationary period, each career-conditional employee, and each career employee in an obligated position.

(d) Group III includes each indefinite employee, each employee serving under a temporary appointment pending establishment of register, each employee in status

quo, and each employee serving under other nonstatus nontemporary appointment.

(e) Subgroup A includes each preference eligible employee.

(f) Subgroup B includes each nonpreference eligible employee.

* * *

§351.505 Records.

Each agency shall maintain the current, correct records needed to determine the retention standing of its competing employees. The agency shall allow the inspection of its retention registers and related records by: ...

(b) An employee of the agency to the extent that the registers and records have a bearing on his case.

* * *

Subpart F - Release From Competitive Level

§351.601 General.

An agency may not release a competing employee from a competitive level while retaining in that level an employee with a specifically limited temporary appointment, a specifically limited temporary promotion, or an "Unsatisfactory" performance rating. It may not release a competing employee from a competitive level while retaining in that level an employee with lower retention standing, except as . . . permitted under . . . §351.608.

§351.602 Order of release from competitive level.

Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register.

* * *

§351.603 Actions.

Subject to Subpart G of this part, when an agency selects an employee for release from his competitive level, it shall:

(a) Assign him with his consent to a position for which he is qualified which will last at least 3 months;

(b) Furlough him; or

(c) Separate him.

* * *

§351.608 Permissive temporary exceptions.

An agency may make exception for not more than 90 days to the selection sequence in §351.602 and to the section provisions of §351.603 when needed to retain an employee for 90 days or less after the effective date of release from the same competitive level of a higher-standing employee to continue an activity without undue interruption, ...or when the temporary retention of the lower-standing employee does not adversely affect the

rights of any higher-standing employee who is released ahead of him.... When the agency retains an employee for more than 30 days after the effective date of release from the same competitive level of a higher-standing employee, it shall notify in writing each higher-standing employee of the reasons for the exception and the date the lower-standing employee's retention will end. When the agency retains a lower-standing employee for 30 days or less it shall list opposite his name on the retention register the reasons for the exception and the date his retention will end.

Subpart G - Assignment Rights

§351.701 Qualifications for assignment.

(a) . . . an employee is qualified for assignment under §351.603 if he:

(1) Meets the Commission's standards and requirements for the position.

* * *

(4) Has the capacity, adaptability, and any special skills needed to satisfactorily perform the duties and responsibilities of the position without undue interruption to the activity.

* * *

§351.703 Assignment involving displacement.

An agency shall assign under §351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in

the competitive service in another competitive level in his competitive area which requires no reduction, or the least possible reduction, in representative rate when a position in the other competitive level is held by an employee:

(a) In a lower subgroup; or

(b) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

* * *

Subpart H - Notice to Employee

§351.801 Notice period.

(a) Each competing employee selected for release from his competitive level under this part is entitled to a written notice at least 30 full days, but not more than 90 full days, before the effective date of this release, except as required to comply with this part.

* * *

§351.802 Content of notice.

Except as provided in §351.803, the notice required by §351.801 shall state specifically the action to be taken and its effective date; the employee's competitive area, competitive level, subgroup, and service date; the place where the employee may inspect the regulations and records pertinent to his case ... the reasons for retaining a lower-standing employee in the same competitive level for more than 30 days

under §351.608; and the employee's appeal rights, including the time limit for appeal and the location of the Commission office to which an appeal should be sent.

§351.803 General and specific Notices.

When an agency cannot determine specifically all individual actions at the start of the notice period, it may issue general notices ... supplemented by specific notices. The combined contents of the ... notices shall meet the requirements in §351.802.

* * *

Subpart I - Appeals and Corrective Action

§351.901 Initial appeals.

(a) An employee who has received a notice of specific action and who believes this part has not been correctly applied may appeal to the Commission ... but not more than 15 calendar days after the effective date of the action.

* * *

§351.902 Agency action when Commission recommends corrective action.

(a) It is mandatory that the agency take all corrective action recommended in the Commission's ... decision on an appeal ...

* * *

Subpart J - Establishment and Maintenance of Reemployment Priority List

§351.1001 Establishment of list.

(a) Each agency shall establish and maintain a reemployment priority list for each commuting area in which it separates group I or II employees from competitive positions under this part. The agency shall enter the name of each of these employees on the list for all competitive positions in the commuting area for which he qualifies and is available . ... A group I employee's name remains on the list for 2 years ... from the date he was separated...

* * *

5 C.F.R. 500 Subpart H - Back pay

AUTHORITY: 5 U.S.C. 5596(c)

SOURCE: 46 FR 58275, Dec. 1, 1981.

§550.801 Applicability.

(a) This subpart contains regulations of the Office of Personnel Managemnt to carry out sectio 5596 of title 5, United States Code ...

* * *

§550.803 Definitions.

In this subpart:

"Agency" has the meaning given that term in section 5596(a) of title 5, United States code.

* * *

"Unjustified or unwarranted personnel action" means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or warranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

* * *

§550.805 Back pay computations.

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due an employee --

(1) The employee shall be deemed to have performed service for the agency during the period covered by the corrective action; and

(2) The agency shall compute for the period covered by the corrective action the pay, allowances, and differentials the employee would have received if the unjustified or unwarranted personnel action had not occurred.

* * *

39 C.F.R. §211.2 Regulations of the Postal Service.

(a) The regulations of the Postal Service consist of: ... (2) ...the Employee and Labor Relations Manual ...

* * *

U.S. Postal Service "Employee and Labor Relations Manual"

436 Back Pay

436.1 Corrective Entitlement

.11 An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect which terminated or reduced the basic compensation, allowances, differentials, and employment benefits which the employee normally would have earned during the period.

.12 For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

.21 Any amount earned by the employee in a new employment or in an enlarged part-time employment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which he would be entitled.

Federal Personnel Manual, Chapter 295, Personnel Forms and Documents

Subchapter 3. Position Description

3-2. Contents of Position Description

a. [R]equirements. ... If an agency form is used for position purposes, the form must include ... (f) Certification that the position description is complete and accurate ..."

* * *

FOURTH CIRCUIT COURT OF APPEALS INTERNAL OPERATING PROCEDURES

36.3 Publication of decisions. Opinions delivered by the Court will be published only if the author or a majority of the joining judges believe the opinion satisfies one or more of the standards for publication:

i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or

ii. It involves a legal issue of continuing public interest; or

iii. It criticizes existing law; or

iv. It contains an historical review of a legal rule; or

v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.

36.4 Unpublished dispositions. Unpublished opinions give counsel, the parties and the lower court or agency a state-

ment of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants not represented by counsel. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $1.00.

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

36.5 Citation of unpublished dispositions. In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the dispostion in the appendix to the brief.

Supreme Court, U.S.
FILED
FEB 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1096

In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR H. VAN SANT, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, who was awarded back pay for a three-month period in 1971 after he was terminated by the Postal Service, claims that he is entitled to reinstatement and back pay up to the present.

1. When the United States Post Office Department was reorganized as the United States Postal Service on July 1, 1971, petitioner was employed as a planning architect in the Research and Development Department. Petitioner, who is not a professional architect, developed rough plans known as "functional design specifications" for use by professional design architects. As part of the reorganization, the design architects and the functions they performed were transferred to the Army Corps of Engineers. Pet. App. A9-A11. Petitioner's position was abolished and his job of developing functional design specifications was divided among three industrial engineering technicians at the Postal Service, who performed other tasks that petitioner could not

perform (*id.* at A22). After determining that there were no positions within the Postal Service to which petitioner had any transfer rights, the Postal Service notified petitioner on August 27, 1971, that he would be terminated, and he was terminated on October 12, 1971 (*id.* at A6 n.1).

Petitioner challenged the propriety of his termination. He contended that his job had been transferred to the Corps of Engineers and that he was entitled to a job with the Corps (Pet. App. A66, A100). After the Civil Service Commission and the district court rejected his claims, the court of appeals remanded petitioner's case to the Merit Systems Protection Board (the successor to the Civil Service Commission) in 1979 to conduct "a complete evidentiary hearing on the issue of whether [petitioner's] job function was transferred to the Corps of [E]ngineers or to any other department, and whether, if so, [petitioner] was entitled to a transfer to the receiving agency" (*id.* at A107). On remand, the Board found that petitioner's job had not been transferred to the Corps of Engineers and the district court affirmed, but the court of appeals again reversed and remanded to the Board with instructions to "develop fully a record directly addressing the issues in dispute" (*id.* at A74). In particular, the court instructed the Board to determine the nature of the work performed by four design architects who were detailed from the Corps of Engineers to the Postal Service in 1971 and the reasons why any work preparing functional design specifications was not assigned to petitioner during the period of time that the design architects were detailed to the Postal Service (*id.* at A74-A75).

On remand the Board again determined that petitioner was not entitled to relief (Pet. App. A27-A58). The district court, however, determined that the design architects detailed from the Corps of Engineers had actually performed the work petitioner had been doing until December

7, 1971 (*id.* at A6-A24). It therefore concluded that the Postal Service should not have terminated petitioner until the detail ended on December 7, 1971 (*id.* at A16-A17) and awarded him back pay as if he had been notified of his termination on that date (*id.* at A26).[1]

The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A5). It approved the district court's finding that petitioner's "duties were validly dispersed among other positions" (*id.* at A5). It also concluded that there is "no merit in [petitioner's] contention that he is entitled to reinstatement and back pay to the date of reinstatement" (*ibid.*).

2. The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any other court of appeals and presents no issue of significance. Accordingly, further review is not warranted.

Petitioner contends that he is entitled to reinstatement and back pay from 1971 to the present. He is clearly not entitled to reinstatement with the Postal Service. The court of appeals, the district court, and the Board all agreed that petitioner's job was validly abolished in 1971. As the district court stated, "[t]here was just no place for an 'architect' with the [petitioner's] credentials in the reorganized Postal Service, and the Service was not required to create one" (Pet.

---

[1]While the district court did not state precisely how much back pay petitioner should receive, it clearly intended that he should be paid for the 56-day period from October 12 to December 7, 1971. We assume that, by stating that petitioner should receive the salary "he would have been paid had the notice of termination been given on December 7, 1971" (Pet. App. A26), the court intended petitioner to receive an additional sum to compensate him for the time between the notice of termination, had it been given on December 7, and his actual termination. There was a 39-day period between the date petitioner was notified of his termination and his original termination date (Pet. App. A6 n. 1). Thus the court ruled that petitioner is entitled to approximately three months' back pay.

App. A23). Likewise, each tribunal rejected petitioner's claim that he should have been transferred to the Corps of Engineers. The district court explained that "the design architects who were transferred to the [Corps of Engineers were] * * * professional architects concerned with the actual building design and construction, tasks not within the [petitioner's] responsibility or expertise" (*id.* at A10-A11).

Petitioner's claim that he is entitled to back pay is also frivolous. Back pay is intended to recompense an employee for amounts he would have earned had an erroneous personnel action not occurred. Back pay is not intended to put an employee in a better position than he would have occupied had an erroneous agency action never taken place. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 419-421 (1975). It would make no sense to grant petitioner a windfall in the form of 14 years' back pay because the district court found that he was dismissed three months early. Courts undoubtedly have discretion to limit back pay awards to periods during which an employee would have had a job if proper procedures had been followed.[2] Petitioner cites no authority supporting such an award.[3]

---

[2]In *Kozak* v. *United States*, 458 F.2d 39 (Ct. Cl. 1972), for example, a federal employee was terminated because his position was abolished. The Court of Claims determined that the termination was improper because the employee should have been transferred to another position that he sought. That position, however, was subsequently abolished as well. The Court of Claims determined that the employee was entitled to back pay only until such time as the position to which the employee should have been transferred was abolished. *Id.* at 41-42.

[3]Petitioner cites (Pet. 30-34) a number of cases that generally provide that back pay statutes are intended to provide "full" or "complete" relief. These cases do not support petitioner's claim since he was granted complete relief.

Petitioner notes (Pet. 17 (emphasis omitted)) that the Court stated in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), that courts " 'must judge the propriety of [an agency] action solely on the grounds invoked by the agency.' " He argues that he is entitled to 14 years' back pay because the courts determined that he should not have been notified of his termination until December 1971 while the Postal Service never made such a determination. Petitioner's argument is insubstantial. This case, unlike *Chenery*-type cases, does not involve judicial creation of a rationale for agency action not advanced by the agency itself. Here the Postal Service, like the reviewing courts, stated that petitioner was terminated because his position was abolished and there was no other job that he could perform. The only disagreement was that the courts determined that the Postal Service should not have terminated petitioner until the architects detailed from the Corps of Engineers had ended their service.[4] The award of three months' back pay fully compensated petitioner for the Postal Service's error.

---

[4]Therefore, contrary to petitioner's claim (Pet. 19-20), the decision in *Horne* v. *MSPB*, 684 F.2d 155 (D.C. Cir. 1982), does not support his argument. In *Horne* the ICC demoted two employees without following formal reduction-in-force procedures because the demoted employees were erroneously considered to be political employees who could be demoted summarily. The Board subsequently approved the demotions, despite the error, because it concluded that the ICC could have demoted the employees after following reduction-in-force procedures if the ICC had made certain discretionary determinations. The court of appeals reversed and remanded the case to the ICC, citing *Chenery* and stating that the Board should not have determined what the ICC might have done had it followed proper procedures (684 F.2d at 157-158), although it noted that "[i]t would obviously be wasteful to send a decision back to an agency for further action if facts already established make such further action by the agency predetermined" (*id.* at 158 n.4). It would clearly be wasteful to send this case back for further proceedings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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No. 85-1096

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UNITED STATES POSTAL SERVICE, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
To The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner's Reply Brief

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VICTOR H. VAN SANT, Petitioner

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Petitioner's Reply Brief

Respondents' Memorandum in Opposition does not challenge the first of two key determinations made below: that petitioner was improperly reduced-in-force and separated from federal service in 1971 at a time when employees of another agency

(the Army Corps of Engineers) on long "details" not properly authorized (Petition p. 7) to the Postal Service took over petitioner's specialized tasks. In affirming, the Court of Appeals noted (A4) that the District Court "discerned" that the underlying "reality" constituted a "transfer of function" within the meaning of the Veterans' Preference Act of 1944, 5 U.S.C. §3503(a) (Appendix B2), under which a veteran employed in such a transferred function is to be transferred to the "receiving agency". It is a subsequent determination below and the relief denied that is disputed.

In a second determination, which respondents defend, the District Court established a substitute date for petitioner's RIF Notice, without further agency action, notice, or decision. The District Court ordered Van Sant to be treated as reduced in force by the Postal

Service effective retroactively to a "notice" date 102 days later, December 7, 1971 (A25-26).1/ In a brief explanation of this second determination, for which no precedent or authority was cited, the District Court listed three factual circumstances said to exist as of December 7, 1971.2/ The Court of Appeals also affirmed this determination, supplying no additional explanation or authority.

Respondents' Opposition argues that the District Court's second determination was within its power, and did not deprive petitioner of back pay and reinstatement rights on three invalid grounds, as follows:

1/ The Court failed to specify an actual release date. Respondents' Memorandum at p.3 attempts to exorcise the serious vagueness of the order by assuming what the court "intended".

2/ Specifically, that by December 7, 1971, "neither the plaintiff's position nor his former task was continued and ... the detailees were no longer in the plaintiff's competitive area" (A16).

1. Respondents mistakenly argue that decisions of this and other federal courts bearing on the Back Pay Act of 1966 construe its mandatory back pay provisions as "discretionary". Respondents boldly assert that Van Sant's claim to an unlawful deprivation of back pay under the Back Pay Act of 1966 (Appendix B3) by the relief ordered below is "frivolous" (p. 4); and that such an award would be a "windfall" to Van Sant (id.), placing him in a "better position than he would have occupied had an erroneous personnel action never taken place," emp. sup., citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (id.). To support their contention that Back Pay Act relief is discretionary, respondents cite Kozak v. U.S., 458 F.2d 39 (Ct.Cl. 1972) (id.).

Respondents' contentions are neither explained nor sustained by Albemarle Paper or Kozak. Albemarle Paper involved Title

VII of the Civil Rights Act of 1964, as amended.3/ Yet despite the openly discretionary back pay wording of Title VII, this Court concluded that Congress intended that a back pay award to remove the "effects" of a violation (p. 418-419) normally should be made to effectuate Title VII public policy purposes "of eradicating discrimination ... and making persons whole for injuries suffered" (p. 421). The court's invocation of public policy and "the 'make whole' purposes of Title VII" (p. 418-421), is relevant a fortiori to the comparable public policy and "make whole" purposes revealed in the legislative history of the Back Pay Act of 1966 (Petition, p. 27-29, 34).

3/ The pertinent language read: "If the court finds respondent has intentionally engaged in ... an unlawful employment practice ... the court may ... order ... affirmative action ... which may include ... pack pay ..." (at p. 415, ft. 9).

A fortiori because Congress made the "make whole" back pay provisions of the 1966 Act mandatory.

The 1966 Act provides that an employee found to have been separated through

> "[a]n unjustified or unwarranted personnel action ... is entitled, on correction of the personnel action, to receive for the period for which the personnel action is in effect (1) an amount equal to all ... of the pay ... the employee normally would have earned or received," less interim outside earnings. (5 U.S.C. §5596, see B3-4)

Congress knew when the 1966 Act was enacted that this Court had held in Service v. Dulles, 354 U.S. 363, and Vitarelli v. Seaton, 359 U.S. 16, that the separation of a federal employee accomplished in violation of law or binding regulations was, for reasons of public policy, to be treated as a nullity (Petition p. 22-29). This was held in Vitarelli and thereafter to mean that the employee legally continues as if on the

rolls of the agency until, after restoration to duty, proper personnel measures are followed (Petition p. 25, 30-32, 34-36). Thus, the key phrase in the 1966 Act requiring back pay for "the period for which the [unjustified] personnel action is in effect" was known to mean then, and has always meant, until the "void" character of the personnel action ceases, which normally requires reinstatement. Attempts at a substitute judicial order based on the underlying merits of a separation action found to be invalid under binding law or regulations have been repeatedly rejected. This was the holding in Service (id. p. 23), and has been consistently followed in a long progeny of cases (id. 34-36). Respondents' new attempt to dismiss 30 years of jurisprudence with a case-empty wave of the hand (Opposition p.4, footnote 3) cannot fly.

In an effort to produce one case for

the extreme proposition that back pay for wrongfully dismissed federal employees can be discretionarily limited, respondents cite the Court of Claims' decision in Kozak v. U.S., supra (Opposition p. 4). Kozak is represented as holding that "the employee was entitled to back pay only until such time as the position to which the employee should have been transferred was abolished", emp. sup. (id., ft.2). But respondents entirely misrepresent Kozak. Kozak involved a non-career employee with retention rights "subordinated to ... employees on ... probational status and ... limited to his own division," emp. sup. (458 F.2d 40, ft.2). After Kozak was improperly riffed his entire division was abolished (p. 41-42). The court held that plaintiff was entitled to back pay up to the date "the entire Aerospace Technology Division was abolished" since his "'bumping rights' as

an indefinite status employee were limited to that division" (id.).

Van Sant in sharp contrast is a career, fully-tenured, veteran-status employee with extensive retention rights. Only if Van Sant's entire agency were abolished with no continuation of his functions by any agency could his legal rights to further federal employment be extinguished under the reasoning in Kozak.

Respondents have clearly failed to show how the December 7, 1971 order below can be reconciled with Van Sant's mandatory entitlement to back pay under the 1966 Act and decisions of this Court.

2. Respondents deny Van Sant is entitled to reinstatement, based on untenable reasoning. Although this Court directed reinstatement in Vitarelli, and the Back Pay Act of 1966 operates to require the reinstatement of a wrongfully separated federal employee (para. 1

above), and although the Veterans' Preference Act directs continuing employment (see p.2 above), respondents also boldly assert that Van Sant is "clearly not entitled to reinstatement with the Postal Service (p. 3), nor the Corps of Engineers (p. 4), offering non-case-supported contentions.

Vis-a-vis the Postal Service respondents argument is that the reviewing bodies below "agreed" that petitioner's "job" (sic) was "validly abolished in 1971," and held there was "'no place for an "architect" with the [petitioner's] credentials in the reorganized Postal Service'" (p. 3). The first leg of this argument fails to summarize the decisions below correctly. It was determined below that petitioner's "job" (in distinction to his "position") was <u>not</u> abolished, that it was <u>taken over</u> by COE detailees, making Van Sant's release unlawful under the

Veterans' Preference Act.

The second leg, that it is somehow consequential that the Postal Service "abolished" all "positions" labeled "architect" positions, is meaningless. The rights of career federal employees to continued government service are not controlled by position labels (see, e.g. A69). Inter alia, there are statutory rights (para. 1 above), notice rights (Petition p. 8, ft.1), and assignment rights to positions relating to their underlying duties and functions (id. p. 20, ft.6). This is why Civil Service rules require carefully conducted dual rounds of competition for the jobs remaining after a RIF occurs (Petition p. 19).

Respondents imply, deceptively, that Van Sant had already received all due consideration for other positions in the Postal Service when he was reached for release on August 27, 1971 (Memorandum p.

1,2). (Even if he had, this would not defeat Van Sant's right to reinstatement which is based on statutory provisions and the public policy enunciated by this Court in Service and Vitarelli). But respondents' implication is false.

The MSPB found that a reassignment of Van Sant's duties to other Postal Service personnel occurred after the establishment of a reorganized Engineering Branch that itself took place "following the appellant's separation" (A50, A52). Since three COE detailees were still in Van Sant's job when he was separated (A53-54), this finding is undoubtedly true. Van Sant never received consideration for his ability to perform drastically revised position duties within his agency for which he was expertly qualified. (Note Petition p. 9 discussing false Postal Service advice to CSC that it had not reassigned Van Sant's duties; this dere-

liction renders invalid the CSC conclusions in 1972 regarding Van Sant's lack of bumping rights to pre-reassignment positions).

Vis-a-vis its contention that Van Sant can also have no reinstatement entitlement to the Corps of Engineers, respondents say only that "each tribunal rejected petitioner's claim that he should have been transferred to the Corps" (p. 4); it is explained: the "'design architects who were transferred to the [Corps were] professional architects concerned with ... tasks not within Van Sant's responsibiilty or expertise'" (id.). These contentions establish nothing.

The District Court and the Court of Appeals did not "reject" petitioner's claim of entitlement to a transfer to the Corps, but <u>on the contrary</u> found that Van Sant's transfer rights under 5 U.S.C. §3503(a) were <u>violated</u>. What the courts

below failed to do was to implement their finding of a §3503 violation in a way that would meaningfully protect the mandatory transfer right for veterans established by Congress. Respondents seek to travel on what is a facially evident flaw in the decisions below. As the Petition explains with unrebutted cogent citations at p. 38-41, only current reinstatement of Van Sant can properly cure the violation of his mandatory transfer rights.

Nor does it help respondents to disparage Van Sant as not a "professional" "design" architect. Since it has been determined that Corps employees took over, de facto, Van Sant's "planning" function, it follows necessarily that Van Sant had a statutory right to be transferred to the receiving agency, not implemented below.4/

4/ The Corps was served herein, did not object to service, and has been represented below by Postal Service counsel.

(footnote continued)

3. Respondents mistakenly argue that the District Court's substitute separation Notice of December 7, 1971, can be reconciled with SEC v. Chenery Corp.

Respondents admit that under SEC v. Chenery Corp., 332 U.S. 194, a reviewing court "'must judge the propriety of [an agency] action solely on the grounds invoked by the agency'" (p. 5). And they concede that the District Court's third-mentioned reason for ordering a December 7, 1971, Notice date for Van Sant's release that COE detailees "were no longer in the plaintiff's competitive area") was a judicially-supplied determination not used by the Postal Service when it terminated Van Sant earlier (id.). Never-

(footnote 4 continued)

Petitioner believes that reinstatement to the Postal Service, however, is the more appropriate remedy, since that is where Van Sant's function is now located, see Petition p. 11, ft.3.

theless, respondents again boldly argue that this new rationale by the District Court can be ignored (id.). They cite to a footnote remark by the D.C. Circuit on reversing the MSPB for supplying an unauthorized rationale in a RIF case, Horne v. MSPB, 684 F.2d 155, 158N.4 (1982), that it would be "wasteful" to send a decision back to an agency "if facts already established make such further action by the agency predetermined" (id. ft. 4). Respondents argument is that the Postal Service and the reviewing courts "stated that petitioner was terminated because his position was abolished and there was no other job that he could perform" (Memorandum p. 5). These "facts" are said to suffice to fit the District Court's December 7 release Notice date within Horne dicta. This reasoning resembles a piece of Swiss cheese.

In the first place, the District Court's third reason for its order is a judicially-supplied factual rationale that introduces an element crucially different from the factual circumstances, and reasons causing the Postal Service to "reach" Van Sant for "release" in August 1971 (for the then circumstances see Petition p.7-8; CSC regulations at B9, B11, B14). The Postal Service in August failed to consider at all that the COE detailees were in Van Sant's competitive area because these irregular details were arranged without Postal Service Management approval, or knowledge (Petition p. 7; admitted at TR Exhibits Vol. II. p. 11-12, 173). Further, as explained in para. 2 above, no consideration was ever given by Postal Service officials (and none ever claimed, Petition p. 14, ft.5) to Van Sant's Civil Service and VPA-protected right to receive job offers to <u>revised</u> positions in the

Postal Service once his duties were reassigned, a reassignment that occurred after Van Sant's release. In short, there are no key "facts already established" in this case that would "predetermine" an agency decision on December 7, 1971, to again reach Van Sant for release. (Not to mention factual circumstances involving all the new and revised positions as of December 1971 that are not even remotely embraced in the record below.) Whatever the agency's reasons for decision-making they would necessarily have to be drastically different from its misinformed decision-making concerning Van Sant on August 27, 1971.

Further, the cases cited in the Horne footnote, and the Horne decision itself, make clear that the conduct of Civil Service reduction-in-force competition rounds are not matters for reviewing courts to conduct with independent ini-

tiative, since Congress has assigned this domain exclusively to agency "discretion". Typically, in Local 833 UAW v. NLRB, 300 F.2d 699, 705 (1962), cited by Horne, the D.C. Circuit held it had no authority to supplant agency discretion to determine whether employee misconduct could be a discharge "for cause" under §10(a) of the NLRA. Only in Chae-Sik Lee v. Kennedy, 294 F.2d 231 (1961) did the D.C. Circuit find further agency action unnecessary where the ultimate facts were indisputable, and the question was one of statutory construction under the Immigration and Nationality Act.

The chief "ultimate fact" that is clear in this case is that the District Court committed a free-wheeling intrusion into personnel matters committed by Congress to exclusive agency discretion when it conducted an unauthorized, retroactive Civil Service competition for Van Sant. As this

Court said plainly in Chenery Corp. a District Court is "powerless" to proceed in this manner (332 U.S. at p. 196).

Conclusion

An indefensible error was committed below when the District Court conducted its own retroactive RIF of petitioner. The order below guts Congressional back pay and veteran-protection statutes and rewrites or ignores decisions of this Court and over 30 years of consistent federal personnel law. To prevent an outrageous injury to public policy and to the integrity of this Court's decisions the Petition herein should be granted. A summary order of reversal would be appropriate (see Petition p. 46-47).

Respectfully submitted,

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March 8, 1986

Certificate of Service

I hereby certify that three copies of the foregoing petition were mailed, first class mail, postage prepaid, this 10th day of March, 1986 to : (a) the Solicitor General, Department of Justice, Washington, D.C. 20530; and (b) counsel of record for defendants, Kevin B. Rachel, Esq., Office of Labor Law, U.S. Postal Service, 475 L'Enfant Plaza, Washington, D.C. 20260-1131.

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